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EDITOR'S NOTE

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January 12, 1987

Title: Otis R. Bowen, Secretary of Health and Human Services, Petitioner
v.
Mary Alice Galbreath

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Bartels,Anthony

Entry	Date	Note	Proceedings and Orders
1	Oct 30 1986		Application for extension of time to file petition and order granting same until January 11, 1987 (Blackmun, November 3, 1986).
2	Jan 12 1987	G	Petition for writ of certiorari filed.
3	Feb 18 1987		DISTRIBUTED. March 6, 1987
4	Mar 11 1987	P	Response requested -- [JUS]. (Due April 10, 1987)
5	Apr 8 1987		Brief of respondent Mary Alice Galbreath in opposition filed.
6	Apr 15 1987		REDISTRIBUTED. May 1, 1987
7	May 4 1987		Petition GRANTED.
			**********
9	Jun 18 1987		Order extending time to file brief of petitioner on the merits until July 18, 1987.
10	Jul 6 1987		Record filed.
11	Jul 17 1987		Joint appendix filed.
12	Jul 17 1987		Brief of petitioner Bowen, Sec. of HHS filed.
13	Aug 7 1987		Record filed.
14	Sep 27 1987		Brief of respondent Mary Alice Galbreath filed.
15	Oct 9 1987		CIRCULATED.
16	Oct 9 1987		SET FOR ARGUMENT. Wednesday, December 9, 1987. (4th case).
17	Nov 12 1987	X	Reply brief of petitioner Bowen, Sec. of HHS filed.
18	Dec 9 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86 - 1146

No.

Supreme Court, U.S.
FILED
JAN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARY ALICE GALBREATH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Title XVI of the Social Security Act, 42 U.S.C. (& Supp. II) 1381-1383, provides supplemental security income (SSI) benefits to financially-needy persons who are aged, blind, or disabled. The question presented is whether federal courts may direct the Secretary of Health and Human Services to withhold attorney's fees from court-ordered past-due SSI benefits and pay those fees directly to the needy person's attorney.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARY ALICE GALBREATH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 799 F.2d 370. The opinion of the district court (App., *infra*, 9a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 11a) was entered on August 14, 1986. On November 3, 1986, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including January 11, 1987 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of Title II of the Social Security Act, 42 U.S.C. 405(g), 406(a) and (b)(1), and 407, and of

Title XVI of the Social Security Act, 42 U.S.C. 1383(c)(3) and (d)(1), are set forth in the Appendix, *infra,* 12a-15a.

STATEMENT

This case concerns Title XVI of the Social Security Act, 42 U.S.C. (& Supp. II) 1381-1383, particularly its relationship to Title II of that Act, 42 U.S.C. (& Supp. II) 401-432, with which Title XVI overlaps both substantively and structurally. Title II is one of the earliest federal programs enacted by Congress to provide old-age, survivor, and disability benefits for insured individuals. See 42 U.S.C. (& Supp. II) 403, 423. Title II benefits do not depend on a showing of financial need. Title XVI is a relatively new federal program, enacted in 1972. It provides supplemental security income (SSI) benefits to individuals who are aged, blind, or disabled *and* who are financially needy. See 42 U.S.C. (& Supp. II) 1382(a). An individual's Title II benefits, if any, are included in his income for purposes of determining his financial eligibility for Title XVI benefits. See 42 U.S.C. 1382a(a)(2)(B), 1382(c)(3). The precise question here is whether 42 U.S.C. 406(b)(1), a provision of Title II authorizing attorney's fees to be set off against court-ordered past-due disability benefits, has any application in Title XVI, which has no analogous provision.

1. In August 1983, after the Secretary had denied her application for SSI benefits, respondent brought this suit in federal district court challenging the Secretary's determination (App., *infra*, 2a). In February 1985, the district court reversed the Secretary's decision and ordered that SSI benefits, including past-due benefits, be paid to respondent. The Secretary accordingly mailed respondent a check for $7,954, the full amount of her past-due benefits, in July 1985 (*id.* at 2a, 9a-10a).

Respondent's lawyer subsequently moved the district court for an award of attorney's fees. On October 15, 1985, the district court ordered "that an attorney's fee in

the amount of $1,988.50 payable from [respondent's] past due benefits is hereby allowed to [her] attorney, pursuant to 42 U.S.C. § 406(b)(1)" (App., *infra*, 10a). Section 406(b)(1) provides that, where a court orders the payment of disability benefits under Title II, "the court may determine and allow as part of its judgment a reasonable [attorney's] fee * * *, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled" (App., *infra*, 13a). That Section further provides that the attorney's fees are to be paid "out of, and not in addition to, the amount of such past-due benefits" (*ibid.*). The district court accordingly ordered the Secretary to "compute, certify and pay" out of respondent's past-due Title XVI benefits a fee in the amount of $1,988.50--25% of the amount to which she was entitled—to her lawyer (App., *infra*, 10a).[1]

2. The court of appeals affirmed (App., *infra*, 1a-8a). The court acknowledged (*id.* at 7a-8a) that Title XVI, unlike Title II, nowhere explicitly authorizes a district court to order the Secretary to pay attorney's fees out of a claimant's past-due SSI benefits. The court further acknowledged that Congress had expressly determined not to allow the Secretary to withhold attorney's fees from past-due SSI benefits in *administrative* proceedings—something Title II also permits (see 42 U.S.C. 406(a))—because " 'withholding of attorney fees from [an] individual's benefits * * * would be contrary to the purpose of the [Title XVI] program' " (App., *infra*, 4a, quoting H.R. Rep. 92-231, 92d Cong., 1st Sess. 156

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[1] Since the Secretary had previously paid respondent the full amount of her past-due benefits (App., *infra*, 2a), and since Section 406(b)(1) states that an award of attorney's fees must be paid "out of" past-due benefits, it would be necessary for the Secretary to recoup $1,988.50 from respondent in order to comply with the district court's directive. See 42 U.S.C. (Supp. II) 1383(b) (authorizing HHS to recoup erroneous overpayments of SSI benefits).

(1971)). And the court acknowledged (App., *infra*, 4a) that Congress, while incorporating many provisions of Title II into Title XVI by reference, had failed to incorporate the provision (42 U.S.C. 406(b)(1)) upon which the district court predicated its decision. The court of appeals nevertheless concluded that, "[a]bsent express statutory prohibition, [a] district court possesses the inherent power to withhold and certify for payment an attorney's fee from SSI benefits," stating that such authority "is an integral part of the court's power of judicial review under [42 U.S.C.] 405(g)." App., *infra*, 7a-8a. The court recognized that its holding to this effect conflicts with a recent decision of the Sixth Circuit, which "held that [a] district court is without authority to order the payment of attorney's fees from past-due SSI benefits." App., *infra*, 5a (citing *McCarthy* v. *Secretary of Health & Human Services*, 793 F.2d 741, 744-745 (1986)).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals incorporates into Title XVI by judicial fiat a provision of Title II that Congress specifically declined to incorporate by legislative enactment. That decision frustrates congressional intent, since it requires the reduction of benefits to financially needy persons in a fashion that Congress stated "would be contrary to the purpose of the [Title XVI] program" (H.R. Rep. 92-231, *supra*, at 156). The decision below squarely conflicts with a recent decision of the Sixth Circuit, and it presents a recurring issue of great practical concern to the Secretary. This Court's review is therefore warranted.

1. Unlike Title II, Title XVI of the Social Security Act nowhere explicitly authorizes a district court to order the Secretary to withhold a portion of a claimant's past-due SSI benefits for payment of an attorney's fee directly to the claimant's lawyer. The language and structure of Title XVI, moreover, as well as its legislative history, belie any

assertion that Congress implicitly intended to allow, let alone require, such withholding by the Secretary in derogation of a claimant's basic subsistence needs.

a. Both Title II and Title XVI generally prohibit the assignment to another person of an individual's benefits. See 42 U.S.C. 407 and 1383(d)(1). In Title II, Congress lifted this bar in two relevant instances, neither of which Congress chose to repeat in Title XVI. Pursuant to 42 U.S.C. 406(a), the Secretary may prescribe a reasonable attorney's fee to which a successful claimant's counsel is entitled for services performed before the Secretary, and must withhold a corresponding portion of the claimant's past-due Title II benefits and pay that sum directly to the claimant's counsel. Similarly, pursuant to 42 U.S.C. 406(b)(1), a court may prescribe a reasonable attorney's fee to which a successful claimant's counsel is entitled for services performed in court, order the Secretary to withhold that amount out of the claimant's past-due Title II benefits, and instruct the Secretary to pay that sum directly to the attorney.

Although Congress incorporated much of Title II into Title XVI—both when enacting Title XVI in 1972 and when amending it in 1976 (see, *e.g.*, 42 U.S.C. 1383(c)(3) and (d)(1))—in neither instance did Congress incorporate the provisions of Title II that authorize the withholding of a claimant's past-due benefits for payment as attorney's fees. Significantly, Congress did provide in Title XVI that the Secretary may "prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary," a sentence taken verbatim from the parallel section in Title II. Compare 42 U.S.C. 1383(d)(2) (fourth sentence) with 42 U.S.C. 406(a) (fourth sentence). But Congress omitted from Section 1383(d)(2) the further authorization, set forth in the next sentence of Section 406(a), for the withholding from the claimant's benefits of attorney's fees determined in accordance with

that limitation. As explained in the House Report, Congress deliberately omitted any withholding authority in the context of Title XVI administrative proceedings because it concluded that "to withhold such fees would be contrary to the purpose of the program" (H.R. Rep. 92-231, *supra*, at 156).

Just as Congress declined to incorporate in Title XVI the Title II provision authorizing the offset of attorney's fees in *administrative* proceedings (Section 406(a)), so Congress declined to incorporate in Title XVI the Title II provision authorizing the offset of attorney's fees in *judicial* proceedings (Section 406(b)(1)). And it is logical to assume that the reason Congress declined to do so is the reason that it gave in 1972—that withholding of attorney's fees out of SSI benefits "would be contrary to the purpose of the [Title XVI] program." Unlike Title II benefits, which are based on a person's disability and insured status, Title XVI benefits are based on a person's financial need. For that reason, Congress evidently determined that an up-front reduction in past-due benefits by as much as 25% would be unacceptable in the SSI context, since it could impose hardships on recipients who are by definition below the basic subsistence level. Instead, Congress left it to the SSI recipient and his lawyer to arrange for the latter's compensation in some less burdensome fashion, such as payment in installments over an extended period of time.

In sum, the district court's order in this case, upheld by the court of appeals, is directly contrary both to the structure of the statute and to congressional intent. Congress deliberately declined to incorporate into Title XVI any authority to withhold portions of a claimant's past-due SSI benefits for direct payment to the claimant's counsel. The Secretary's construction of Title XVI is entitled to deference and should have been upheld.

b. The Eighth Circuit in this case (App., *infra*, 4a-5a, 7a-8a), like other courts that have ruled against the Secretary on this question,[2] relied on a 1976 amendment to Title XVI to support the view that courts possess inherent or implicit authority to order the withholding of past-due SSI benefits to pay a claimant's attorney. Prior to its amendment in 1976, Section 1631(c)(3) of Title XVI, 42 U.S.C. (Supp. II 1972) 1383(c)(3), provided:

> The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title; except that the determination of the Secretary after such hearing as to any fact shall be final and conclusive and not subject to review by any court.

In 1976, Congress amended the statute to delete the "except" clause. Act of Jan. 2, 1976, Pub. L. No. 94-202, § 1, 89 Stat. 1135. The effect of this amendment was to make the Secretary's factual findings in SSI cases subject to judicial review, whereas such findings had previously been final and conclusive. As the Senate Report noted, the result of deleting the "except" clause was that Section 405(g) thenceforth applied identically to the Secretary's disability and SSI determinations, so that "the same rules of judicial review [apply] to title XVI cases as apply to title II cases." S. Rep. 94-550, 94th Cong., 1st Sess. 4 (1975).

According to the Eighth Circuit (App., *infra*, 8a), one effect of this 1976 amendment was to empower courts for the first time to offset attorney's fees against past-due SSI benefits, on the theory that "the authority to provide for

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[2] See, *e.g.*, *Reid* v. *Heckler*, 735 F.2d 757 (3d Cir. 1984); *Adams* v. *Secretary of Health & Human Services*, 596 F. Supp. 449, 453 (N.D. N.Y. 1984); see also *Dolin* v. *Harris*, 501 F. Supp. 97, 98 (D. Md. 1980).

the payment of attorney's fees is an integral part of the court's power of judicial review under Section 405(g)." This conclusion completely misapprehends the significance of the 1976 amendment. The sole purpose and effect of that amendment was to make the Secretary's factual findings in SSI cases subject to judicial review. There is absolutely no suggestion in the legislative history that Congress intended by this action to modify the careful and deliberate manner in which it had addressed the subject of attorney-fee withholding four years earlier, when it stated that the withholding of attorney's fees in Title XVI cases "would be contrary to the purpose of the [Title XVI] program." H.R. Rep. 92-231, *supra*, at 156. Indeed, the withholding of attorney's fees in Title II cases is authorized by Section 406(b)(1), not by Section 405(g), and it is simply illogical to assume that Congress in 1976 meant to incorporate the former Section into Title XVI by amending a reference to the latter.[3]

[3] The court of appeals likewise erred in relying (App., *infra*, 3a, 6a) on *Celebrezze* v. *Sparks*, 342 F.2d 286, 288 (5th Cir. 1965), which held that Section 405(g) endowed the courts with inherent power to provide for the payment of attorney's fees from past-due Title II benefits. Four months after the decision in *Sparks*, Congress codified its result by adding Section 406(b) to Title II. Social Security Amendments of 1965, Pub. L. No. 89-97, § 332, 79 Stat. 403. But Congress has never acted to add a similar provision to Title XVI, thereby evidencing its intent, explicit in the 1972 legislative history, that such a provision "would be contrary to the purpose of the [Title XVI] program." H.R. Rep. 92-231, *supra*, at 156. The rationale of the *Sparks* decision has thus been superseded by subsequent legislative developments. Indeed, other aspects of the decision below make it clear that the Eighth Circuit itself did not rely on the rationale of the *Sparks* decision, *i.e.*, that the courts have inherent rather than statutory authority to offset attorney's fees. If that had been the Eighth Circuit's rationale, there would have been no basis for its endorsement of the district court's holding that "the maximum allowable [attorney's fee] is twenty-five percent of past due benefits." App., *infra*, 10a; see *id.* at 8a. That 25% limitation is derived from Section 406(b)(1), and thus it is clear that the court of appeals elected to incorporate that provision of Title II into Title XVI, relying on such supposed statutory authority rather than on any inherent judicial authority to provide for the payment of attorney's fees out of SSI benefits. Indeed, the district court's decision is explicit to this effect. See App., *infra*, 10a ("Therefore, IT IS ORDERED that an attorney's fee * * * payable from the plaintiff's past due benefits is hereby allowed to * * * plaintiff's attorney, pursuant to 42 U.S.C. § 406(b)(1).").

At bottom, the court of appeals' decision to incorporate Section 406(b)(1) into Title XVI rests on its belief that Congress must have intended this result because, in the court's view, withholding of attorney's fees is equally sound policy in Title XVI as in Title II. See App., *infra*, 8a; see also *Reid* v. *Heckler*, 735 F.2d at 762 ("The need for competent representation is perhaps even more acute [in Title XVI cases] than in Title II cases because the claimants in Title XVI matters are, by definition, in financial straits."). But Congress reached precisely the opposite policy determination when it concluded that withholding of attorney's fees "would be contrary to the purpose of the [Title XVI] program" because of the hardship that such a reduction in past-due benefits would impose on the program's needy recipients. H.R. Rep. 92-231, *supra*, at 156. The Secretary has properly deferred to that congressional policy judgment, and the court of appeals had no license to arrive at a different accommodation of the competing interests.

2. As the court of appeals acknowledged (App., *infra*, 5a), its decision squarely conflicts with the Sixth Circuit's recent decision in *McCarthy* v. *Secretary of Health & Human Services*, 793 F.2d 741 (1986). Numerous district court decisions have also upheld the Secretary's view. See, *e.g.*, *Brown* v. *Bowen*, No. 84-4284-RV (N.D. Fla. May 22, 1986); *Franklin* v. *Secretary of Health & Human Services*, 525 F. Supp. 398, 399 (E.D. Mich. 1981); *Baim* v. *Harris*, 515 F. Supp. 227 (N.D. Ohio 1981). The Fourth Circuit in dictum has endorsed the Secretary's reading of

Title XVI. See *Motley* v. *Heckler*, 800 F.2d 1253, 1255 (1986) (per curiam). And the question presented here is currently pending in three other circuits. See *Clay* v. *Secretary of Health & Human Services*, No. 86-1995 (1st Cir.); *Howard* v. *Bowen*, No. 86-2014 (7th Cir.); *Cain* v. *Bowen*, No. 86-8717 (11th Cir.).

Due to the sharply conflicting rulings among the courts that have thus far considered the question, the Secretary faces the onerous task of administering a nationwide federal program differently in different parts of the country. In certain jurisdictions, the Secretary currently may be required to withhold a portion of a claimant's past-due SSI benefits for payment as attorney's fees, but in other jurisdictions the Secretary is forbidden to withhold such amounts. Because HHS litigates thousands of SSI benefit cases in court each year (approximately 8,000 in 1985), the number of individual claimants whose benefits may be affected is potentially great, and the burden on the Secretary of administering such a patchwork scheme is substantial.

This Court has repeatedly stressed that courts should defer to the reasonable construction of a statute by the administrative agency charged with its implementation. See, *e.g.*, *Connecticut Department of Income Maintenance* v. *Heckler*, 471 U.S. 524 (1985); *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 423 (1983). The Secretary's construction of Title XVI is longstanding, is faithful to the language and structure of the statute, and is a reasonable interpretation of congressional intent. Yet both the Third and Eighth Circuits have ignored this Court's precepts and have rejected the Secretary's construction. Review by this Court is needed to settle the existing and rapidly growing conflict in the courts, thereby relieving the administrative burden that the Secretary now faces and restoring uniformity to the Title XVI program.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2496

MARY ALICE GALBREATH, APPELLEE

v.

OTIS R. BOWEN, M.D., SECRETARY OF
HEALTH AND HUMAN SERVICES, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

[FILED AUGUST 14, 1986]

Before WOLLMAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and LARSON, Senior District Judge*

FLOYD R. GIBSON, Senior Circuit Judge.

The Secretary of Health and Human Services ("Secretary") appeals from the district court's[1] order directing the Secretary to pay an attorney's fee from past-due supplemental security income (SSI) benefits awarded to the attorney's client Mary Alice Galbreath, under Title XVI of the Social Security Act ("Act"). The Secretary argues that the Act does not authorize the withholding of past-due SSI benefits for the payment of attorney's fees. We affirm the district court's order.

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* The Honorable Earl R. Larson, United States Senior District Judge for the District of Minnesota.

[1] The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas.

Mary Alice Galbreath applied for SSI benefits on May 26, 1982. The Secretary denied Galbreath's application; on August 10, 1983 Galbreath appealed this administrative decision to the federal district court. On February 15, 1985, the district court reversed the Secretary's denial of Galbreath's claim, and the Secretary proceeded to effectuate the court's decision. Galbreath was sent a check dated July 23, 1985 in the amount of $7,954.00. Galbreath's attorney, Anthony W. Bartels, then moved the court for attorney's fees in the amount of $1,988.50, or 25% of Galbreath's past-due benefits. In its order, the district court determined that the amount requested by Bartels was reasonable, and ordered the Secretary "to compute, certify and pay" Bartels his requested fee.

On appeal to this court, the Secretary argues that neither the Act nor the Secretary's regulations authorized the withholding of past-due benefits for payment of attorney's fees in SSI cases, and that therefore the district court was without the power to order the Secretary to withhold attorney's fees from Galbreath's benefits for payment to Bartels.[2] The Secretary asserts that the section of the Act relied on by the district court in its order, 42 U.S.C. § 406(b)(1), pertains only to attorney's fees for services before the court in Title II (disability benefits) cases, and that no counterpart for section 406(b)(1) exists in Title XVI. Without such statutory authority, the Secretary contends that he is obligated to authorize full payment of SSI benefits to a claimant on establishment of his or her entitlement to such benefits, without diverting part of the benefits in payment of an attorney's fee.

Before we reach the merits of the issue in dispute, some discussion of the differences between Titles II and XVI of the Act is warranted. Title II of the Act provides benefits

[2] The Secretary does not take issue with the amount of attorney's fees awarded Bartels.

for insured individuals suffering from a disability rendering them unable to engage in substantial gainful activity. 42 U.S.C. § 423(a) and (d)(1)(A) (1982). Title XVI, on the other hand, which was enacted in 1972, affords benefits to persons who are aged, blind, or disabled and whose financial resources fall below minimum levels, regardless of whether they have insured status under Title II. 42 U.S.C §1382(a) (1982).

Before 1965, Title II did not expressly authorize a district court to award attorney's fees to a claimant's attorney. In *Celebrezze v. Sparks,* 342 F.2d 286, 290 (5th Cir. 1965), the Fifth Circuit held that the district court acted within its judicial power in providing that attorney's fees be paid out of past-due benefits recovered by a claimant. The court stated that section 205(g)[3] of the Act, 42 U.S.C. § 405(g), gave the district court "full judicial power to deal with the litigation * * * including the power * * * to provide for the payment from the past due benefits recovered by the claimant in the litigation of counsel fees for conducting it." 342 F.2d at 288. The court reasoned that giving the district court the authority to make attorney's fee awards out of past-due benefits would foster the important policy of assuring disability claimants of adequate legal representation. *Id.* at 289. Later in 1965 Congress, "in effect, incorporated the *Sparks* rationale into Title II by an amendment," *Reid v. Heckler,* 735 F.2d 757, 761 (3d Cir. 1984), which was codified at 42 U.S.C § 406(b)(1).[4]

[3] That part of section 205(g) relied on by the court reads as follows:

"The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g).

[4] 42 U.S.C. § 406(b)(1) reads as follows:

Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an

In 1972 Congress enacted Title XVI of the Act. 86 Stat. 1465 (1972) (current version at 42 U.S.C. §§ 1381-1383 (1982)). Although Title XVI incorporates many sections of Title II, section 406(b)(1) is not expressly incorporated, nor does Title XVI, make any other provision for the direct payment of attorney's fees for representation before the district court. In regard to attorney's fees for representation before the agency under Title XVI, the House Ways and Means Committee stated its belief that the "withholding of attorney fees from [an] individual's benefits * * * * would be contrary to the purpose of the program." H.R.Rep. No. 231, 92d Cong., 2d Sess. 3, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4989, 5142.

As enacted, Title XVI called for hearing procedures "the same as under section 405(g) of Title II except that determinations of fact made by the Secretary would be conclusive and not subject to judicial review." *Reid,* 735 F.2d at 761; 86 Stat. 1476. In 1976, however, Congress amended Title XVI to include judicial review of the Secretary's final determination in SSI cases. 42 U.S.C. § 1383(c)(3) provides: "The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title." Thus the amendment was intended to

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attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

result in the application of "the same rules of judicial review to title XVI cases as apply to title II cases." S.Rep No. 550, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. Code Cong. & Ad. News 2347, 2350.

With this legislative history in mind, we take a look at those cases that have addressed the question of the district court's authority to award attorney's fees for services before the court in Title XVI cases. The Sixth Circuit, the Northern District of Florida, the Eastern District of Michigan, and the Northern District of Ohio have held that the district court is without authority to order the payment of attorney's fees from past-due SSI benefits. *See McCarthy v. Secretary of Health and Human Services,* 793 F.2d 741, 744-45 (6th Cir. 1986); *Brown v. Bowen,* ____ F.Supp. ____ No. PCA 84-4284-RV, slip op. at 3 (N.D.Fla. May 22, 1986); *Franklin v. Secretary of Health and Human Services,* 525 F.Supp. 398, 399 (E.D.Mich. 1981); *Baim v. Harris,* 515 F.Supp. 227 (N.D.Ohio 1981). In so holding, these courts have relied on the lack of express authority in Title XVI for such fee awards, and especially on the failure of Congress to incorporate into Title XVI section 406(b)(1) of Title II, permitting the withholding of attorney's fees from past-due benefits. Further, in *McCarthy* the Sixth Circuit believed that the House Ways and Means Committee's position that the withholding of attorney's fees from benefits for representation before the agency "would be contrary to the purpose of the program," would apply equally to representation before the court. *McCarthy,* at 744.

The Third Circuit, the Eastern District of Kentucky, the Northern District of New York, the District of Maryland, and the Eastern District of Tennessee have all held that the district court does possess the authority to make an award of attorney's fees in SSI cases. *Reid v. Heckler,* 735 F.2d at 762; *Mullanix v. Heckler,* 624 F.Supp. 529, 530-31 (E.D. Ky. 1986); *Adams v. Secretary of Health and Human*

Services, 596 F.Supp. 449, 453 (N.D.N.Y. 1984); *Dolin v. Harris,* 501 F.Supp. 97, 98 (D.Md. 1980); *Vaughn v. Califano,* 442 F.Supp. 185, 188 (E.D.Tenn. 1977).[5] These courts acknowledge the lack of express statutory authority for a court award of attorney's fee in SSI cases, but look to the legislative history of Title XVI to find that Congress intended the same treatment on representation and attorney fees as that provided for Title II claimants, and that courts possess an implied and inherent power to make such awards. Just as the Fifth Circuit in *Celebrezze v. Sparks,* 342 F.2d at 288, held that section 405(g) gave courts the power to provide for the payment of attorney's fees from past-due Title II benefits, the Third Circuit in *Reid* reasoned that the 1976 amendment to Title XVI incorporating section 405(g) into Title XVI gives district courts the implied authority to grant attorney's fees in SSI cases. *See Reid,* 735 F.2d at 761-62 ("[S]ection 405(g) has been carried over into Title XVI and with that provision goes the implied and inherent power of the court set out in the *Sparks* case"). Further, the court in *Vaughn* stated, "An integral part of the court's review under 42 U.S.C. § 405(g) relates to the attorney's fee provisions of 42 U.S.C. § 406(b)." 442 F.Supp. at 187. *See also Mullanix,* 624 F.Supp. at 531 (quoting *Vaughn*); *Adams,* 596 F.Supp. at 452 (same).

In response to the Secretary's argument that Congress' failure to expressly incorporate § 406(b) into Title XVI was deliberate and militates against applying its provisions in Title XVI cases, the court in *Vaughn* stated:

> The defendant is obviously correct in its assertion that the Congress has expressly incorporated by reference certain sections of title II into title XVI. *See* 42 U.S.C. § 1383(d)(1). However, this incorporation

[5] The value of *Mullanix v. Heckler* and *Vaughn v. Califano* as precedent was of course negated by the Sixth Circuit's decision in *McCarthy v. Secretary of Health and Human Services.*

> was not a part of the aforementioned 1976 amendment to title XVI, which provided for the judicial review of final administrative determinations denying this category of benefits. These statutory sections were incorporated thereinto by reference long before the Congress acted to grant this Court jurisdiction to review title XVI claims. Accordingly, such expressed incorporation cannot be viewed as a congressional expression that the attorney fee provisions of 42 U.S.C. § 406(b) should not be applicable to the title XVI review procedure. Had the Congress, in passing the 1976 amendments to title XVI, *then* expressly incorporated by reference certain provisions of title II, but without mentioning § 406(b), *supra,* then the defendant's contention in this regard might have merit.

442 F.Supp. at 187. The court in *Adams* made a similar response to the Secretary's citation to the House Report on the original Title XVI amendments that stated that withholding attorney's fees for representation before the Secretary in Title XVI cases "would be contrary to the purpose of the program." The court reasoned that "the Secretary's reliance on legislative history concerning the 1972 amendments cannot outweigh the clear legislative intent of the 1976 amendment making SSI cases subject to the same judicial review as disability cases." 596 F.Supp. at 453.

We find the position taken by the courts in *Reid* and *Vaughn* and their progeny, that the district court does have the power to award attorney's fees from past-due SSI benefits, more compelling than the opposite position taken by the Secretary. Absent express statutory prohibition, the district court possesses the inherent power to withhold and certify for payment an attorney's fee from SSI benefits. Congress made it very clear in amending Title XVI in 1976 to incorporate section 405(g) that the

scope of judicial review under Title XVI was to be "virtually indentical" to that under Title II. *See* S.Rep. No. 550, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. Code Cong. & Ad. News 2347. Because we think that the authority to provide for the payment of attorney's fees is an integral part of the court's power of judicial review under section 405(g) and not contrary to the express intent of Congress, we hold that the district court did not err in directing the Secretary to pay attorney Bartels' fee from claimant Galbreath's past-due SSI benefits. In so holding, we acknowledge the conclusions of other courts that this result will promote the important policy of assuring adequate legal representation of SSI claimants. First, an award of fees to successful counsel furthers the congressional goal of providing SSI benefits through judicial review to those claimants who otherwise would not obtain such benefits. *See Reid,* 735 F.2d at 760, 762; *Mullanix,* 624 F.Supp. at 531; *Adams,* 596 F.Supp. at 453. Second, adoption of the 25% ceiling provides some compensation and hence an incentive to counsel, while simultaneously barring higher fees through private contingency agreements. *Mullanix,* 624 F.Supp. at 531; *Adams,* 596 F.Supp. at 453.

The district court's order is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Civil Action No. J-C-83-223

MARY ALICE GALBREATH, PLAINTIFF

v.

MARGARET M. HECKLER, SECRETARY OF
HEALTH AND HUMAN SERVICES, DEFENDANT

[FILED OCTOBER 15, 1985]

ORDER

Currently pending before the Court is the Petition for Attorney Fees and Allowance of Costs submitted and filed by the plaintiff's attorney, Anthony W. Bartels. The maximum allowable fee is twenty-five percent of plaintiff's back pay; however, the Court may not unquestionably approve an award solely on the basis of a contingency fee contract. 20 C.F.R. §§ 404.1725 and 404.1730.

In each case the judge must assess the value of the lawyer's services to the client in the judicial proceedings. *MacDonald v. Weinberger,* 512 F.2d 144, 147 (9th Cir. 1975); *McKittrick v. Gardner,* 378 F.2d 872 (4th Cir. 1967). The attorney-client agreement is a consideration, but the final fitting of the fee to the services remains the duty of the court. *Fenix v. Finch,* 436 F.2d 831 (8th Cir. 1971); *Robinson v. Gardner,* 374 F.2d 949, 952 (4th Cir. 1967). *See also Blankenship v. Schweiker,* 676 F.2d 116 (4th Cir. 1982).

In this case the attorney has claimed 33.25 hours for the representation provided at the district court level. The

Court does not view this as excessive. In light of counsel's experience, reputation, and ability, the Court finds that $75 is a reasonable hourly rate. However, since the maximum allowable is twenty-five percent of past due benefits, plaintiff's attorney is limited to a fee award of $1,988.50.

Therefore, IT IS ORDERED that an attorney's fee in the amount of $1,988.50 payable from the plaintiff's past due benefits is hereby allowed to Anthony W. Bartels, the plaintiff's attorney, pursuant to 42 U.S.C. § 406(b)(1). The defendant is ordered to compute, certify and pay said attorney this sum.

This ____ day of October, 1985.

/s/ HENRY WOODS
Henry Woods
U.S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2496

MARY ALICE GALBREATH, APPELLEE

v.

OTIS R. BOWEN, M.D., SECRETARY OF
HEALTH AND HUMAN SERVICES, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

[FILED AUGUST 14, 1986]

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby adjudged and decreed that the judgment of the district court is affirmed in accordance with the opinion of this Court.

A true copy.
Attest:

/s/ ROBERT D. ST. VRAIN
Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit

APPENDIX D

RELEVANT STATUTORY PROVISIONS

Section 205(g) of Title II of the Social Security Act, 42 U.S.C. 405(g), provides in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party * * * may obtain a review of such decision by a civil action * * * brought in the district court of the United States for the judicial district in which the plaintiff resides[.] * * * The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive[.]

Section 206(a) of Title II of the Social Security Act, 42 U.S.C. 406(a), provides in pertinent part:

> The Secretary may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under this subchapter, and any agreement in violation of such rules and regulations shall be void. Whenever the Secretary, in any claim before him for benefits under this subchapter, makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim. If as a result of such determination, such claimant is entitled to past-due benefits under this subchapter, the Secretary shall, notwithstanding Section 405(i) of this title, certify for payment (out of such past-due benefits) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 per centum of the total amount of such past-due benefits, (B) the amount of the attorney's fee so fixed, or (C) the amount agreed upon between the claimant and such attorney as the fee for such attorney's services.

Section 206(b)(1) of Title II of the Social Security Act, 42 U.S.C. 406(b)(1), provides:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of Section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

Section 207 of Title II of the Social Security Act, 42 U.S.C. 407, provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Section 1631(c) of Title XVI of the Social Security Act, 42 U.S.C. 1383(c), provides in pertinent part:

> (1) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for payment under this subchapter. Any such de-

cision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. The Secretary shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, if such individual requests a hearing on the matter in disagreement within sixty days after notice of such determination is received, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing affirm, modify, or reverse his findings of fact and such decision. * * *

* * * * *

(3) The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title.

Section 1631(d) of Title XVI of the Social Security Act, 42 U.S.C. 1383(d), provides in pertinent part:

(1) The provisions of section 407 of this title and subsections (a), (d), (e), and (f) of section 405 of this title shall apply with respect to this part to the same extent as they apply in the case of subchapter II of this chapter.

(2) * * * The Secretary may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under this subchapter, and any agreement in violation of such rules and regulations shall be void.

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OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
APR 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1146

In The
Supreme Court of the United States
October Term, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

MARY ALICE GALBREATH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

Title XVI of the Social Security Act, 42 U.S.C. (& Supp. II) 1381-1383, provides supplemental security income (SSI) benefits to financially-needy persons who are aged, blind or disabled. The question presented is whether federal courts may direct the Secretary of Health and Human Services to withhold attorney's fees from court-ordered past-due SSI benefits and pay those fees directly to the claimant's attorney.

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No. 86-1146

In The

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October Term, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

MARY ALICE GALBREATH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

The Secretary of Health and Human Services ("Secretary") appealed to the 8th Circuit from the district court's order directing the Secretary to pay an attorney's

fee from past-due supplemental security income (SSI) benefits awarded to the attorney's client, Mary Alice Galbreath, under Title XVI of the Social Security Act ("Act"). The Secretary argued that the Act does not authorize the withholding of past due SSI benefits for the payment of attorney's fees. The 8th Circuit affirmed the district court's order.

Mary Alice Galbreath applied for SSI benefits on May 26, 1982. The Secretary denied Galbreath's application; on August 10, 1983 Galbreath appealed this administrative decision to the federal district court. On February 15, 1985 the district court reversed the Secretary's denial of Galbreath's claim, and the Secretary proceeded to effectuate the court's decision. Galbreath was sent a check dated July 23, 1985 in the amount of $7,954.00. Galbreath's attorney, Anthony W. Bartels, then moved the court for attorney's fees in the amount of $1,988.50, or 25% of Galbreath's past due benefits. In its order, the district court determined that the amount requested by Bartels was reasonable, and ordered the Secretary "to compute, certify and pay" Bartels his requested fee.

On appeal to the 8th Circuit, the Secretary argued that neither the Act nor the secretary's regulations authorized the withholding of past-due benefits for payment of attorney's fees in SSI cases, and that therefore the district court was without the power to order the Secretary to withhold attorney's fees from Galbreath's benefits for payment to Bartels. The Secretary asserted that the section of the Act relied on by the district court in its order, 42 U.S.C. Section 406(b)(1), pertains only to the attorney's fees for services before the court in Title II (disability benefits) cases, and that no counterpart for section 406(b)(1) existed in Title XVI. The Secretary contended that without such statutory authority, he is obligated to authorize full payment of SSI benefits to a claimant on establishment of his or her entitlement to such benefits, without diverting part of the benefits in payment of an attorney's fee.

PART TWO

REASON WHY THE PETITION SHOULD BE DENIED

1. The United States Court of Appeals for the Eighth Circuit correctly held that federal courts may direct the Secretary of HHS to withhold attorney's fees from court-ordered past-due SSI benefits and pay these fees directly to the claimant's attorney.

In the United States of America, a disabled American may qualify for either, or both, of two federal benefit programs as a result of his or her disability. Under one program, which is known as Title II of the Social Security Act, there is a provision for disability insurance which program is funded by the worker and employer contributions. The other program, the Supplemental Security Income or more commonly known as SSI of Title XVI of the Act does not depend on the claimant's insured status, but instead provides a minimum income for the aged, blind and disabled who meet the disability standards as set by the Secretary of Health and Human Services. A Title II disability claimant can also get Title XVI benefits if his

Title II benefits fall below a certain monthly level of benefits.

The procedure for getting Social Security disability benefits begins with the claimant applying for benefits at his Social Security claim office. There are several appeal steps but usually people are not acquainted with the legal technicalities of the appeal and must eventually get someone to help them. A non-lawyer may also serve as a representative in the Social Security appeal process at the administrative level. The representative is entitled to a fee for services depending on what the Social Security Administration feels is adequate. There is no court review process of an administrative award of a fee. However, if the claimant's case has to be appealed to the court level, the courts then have the power to award a fee. Much trouble comes about in trying to collect a fee in Title II and Title XVI cases. In a Title II case, the Secretary can be very dilatory in not paying for a long period of time, or so to speak, not act on the fee petition. Once a federal court awards a fee for work done at the court level, the Secretary is supposed to make payment accordingly, but there are time delays in that process as well.

In a Title XVI case, the Secretary takes the position that they do not withhold for attorney's fees, but rather pay the money to the claimant and then the claimant is supposed to pay the fee directly to the lawyer. However, in most instances, after an SSI case is won and the Award Certificate is issued, the Social Security Administration pays the money to the claimant and then about a year later acts upon the fee petition awarding a fee. If the claimant or the lawyer is unhappy with the Administration's fee

decision, they can appeal one step, but that appeal is not subject to judicial review. Meanwhile, with the lapse of time, the claimants usually have the money spent and of course it is not unusual for the clients to get their SSI backpay, spend it, then go to a Legal Services organization and take bankruptcy thus defeating the attorney from getting his fee. The Social Security Administration takes a very unique position with regard to claimants. The first position is, when the claimant tries to get fees, they resist him. Once the case is won, then they want to try to cut out the person or representative who helped the claimant get his benefits.

The district court judge in this case awarded a fee to the attorney and then also went on to order that Social Security pay the claimant's attorney fee directly rather than require the attorney to collect his fee from the client.

In the beginning of the Social Security Act, there was only a Title II provision. The Title XVI Act came about in 1972. There was no express authorization to award attorney's fees to the claimant's attorney in the Title II Act, but the federal district courts held that they had the judicial power to do that act of awarding attorney's fees, because the Social Security Act was silent. *Celebrezze v. Sparks*, 342 F. 2d 286, 290 (5th Cir. 1965). Later, Congress changed that and gave the courts the explicit statutory authority.

In 1972, when the Title XVI Act was implemented, most of all the Title II sections were followed but Congress did not explicitly provide for payment of attorney's fees directly in SSI cases. Thus, the district courts were called upon to make decisions and there have been some district

courts ordering the Social Security Administration to withhold and pay directly to the attorney and there have been contrary district court decisions. Congress did provide for judicial review of Title XVI cases just the same as Title II cases. 42 U.S.C. Section 1383(c)(3).

Of the courts holding that the Secretary must withhold and pay the attorney's fee direct, the Sixth Circuit, the Northern District of Florida, the Eastern District of Michigan, and the Northern District of Ohio, have held that the district court is without authority to order payment of attorney's fees from past due SSI benefits. See *McCarthy v. Secretary of Health and Human Services*, No. 85-1401, slip op. at 8 (6th Cir. June 17, 1986); *Brown v. Bowen*, No. PCA 84-4284-RV, slip op. at 3 (N.D. Fla. May 22, 1986); *Franklin v. Secretary of Health and Human Services*, 525 F. Supp. 398, 399 (E.D. Mich. 1981); *Baim v. Harris*, 515 F. Supp. 227 (N.D. Ohio 1981). The reason these courts have declined to rule in favor of holding out benefits is that they have relied upon a lack of express authority in Title XVI and on the failure of Congress to incorporate Title XVI section 406(b)(1) of Title II.

However, the Third Circuit, the Eastern District of Kentucky, the Northern District of New York, the District of Maryland, and the Eastern District of Tennessee have all held that the district court does possess the authority to make an award of attorney's fees in SSI cases. *Reid v. Heckler*, 735 F. 2d at 762; *Mullanix v. Heckler*, 624 F. Supp. 529, 530-31 (E.D. Ky. 1986); *Adams v. Secretary of Health and Human Services*, 596 F. Supp. 449, 453 (N.D. N.Y. 1984); *Dolin v. Harris*, 501 F. Supp. 97, 98 (D. Md.

1980); *Vaughn v. Califano*, 442 F. Supp. 185, 188 (E.D. Tenn. 1977).

These courts acknowledge the lack of express statutory authority for the award of attorney's fees in SSI cases, but they look to the legislative history of Title XVI to find that Congress intended the same treatment on representation and attorney's fees as that provided for Title II claimants and that the Court possesses an implied inherent power to make such awards. The *Reid* court used the same reasoning of the *Sparks* court, *Celebrezze v. Sparks*, 342 F. 2d at 288, holding that the Court has judicial power to award attorney's fees and that the 1976 amendment to Title XVI incorporating the Section 405 (g) gave the district court the implied authority to grant attorney's fees in SSI cases. See *Reid*, 735 F. 2d at 761-62.

This writer admits that the 1972 Act does not make any provision for attorney's fees, but the 1976 addition or revision of the Title XVI Act does grant the court power to award attorney's fees.

Congress made it very clear in amending Title XVI of the Act in 1976 to incorporate Section 405 (g) that the scope of judicial review under Title XVI was to be "virtually identical" to that of Title II. See S. Rep. No. 550, 94 Cong., 1st Sess. 2, *reprinted in* 1975 U.S. Code Cong. & Ad. News 2347.

There is a very important social policy for adequately insuring payment of attorney's fees in SSI cases. It will promote the important policy of insuring adequate legal representation to SSI claimants. *Howard v. Bowen*, 633 F. Supp. 495, 499 (N.D. Illinois) 1986. The Court should

take judicial notice that most of the SSI claimants are poor, illiterate, and very uneducated and are the lower spectrum of our economic society. And, the Court should realize that if it were not for the attorney representing the claimant, he would not have gotten on Social Security in the first place. It is argued by this attorney that the Social Security Administration is trying to put a "damper" on attorneys from taking Social Security cases because they will not take such cases if they cannot get adequate compensation. The Court should take judicial notice that the Reagan Administration is very hard on the social programs of this country.

Another reason for having the attorney's fee awarded by the Court is that the adoption of the 25% ceiling does provide some compensation and does allow the court to regulate the fees of attorneys who practice Social Security Law. Once an attorney wins a case and knows he is going to get paid, he has a different outlook on that type of legal business. To win a case and then to not know how long it is going to take to get a fee petition approved, and the fact that the attorney may not even get paid then, is very disheartening. These are the hard facts of practicing law.

And, the court should be made aware of the Administration's tactics in sending the money to the claimant before the award letter is sent out to the attorney. Of course, the attorney's fee petition cannot be submitted until the award is made, and then the Administration is very lengthy in time about approving the attorney's fee, during which time the SSI claimant uses the funds for other purposes than paying his lawyer. It should be made known

to the Court that there is a health care card that comes with the Award of Title II benefits and Title XVI benefits which pays the health care providers. Lawyers do not have the benefit of such a program.

Finally, attached as Appendix E is an article from the Federal Register, Vol. 52, No. 51, Tuesday, March 17, 1987, dealing with the proposed rules of the Social Security Administration revising 20 C.F.R. Part 416, changing the rules to hold that there will be no responsibility on the part of the Administration for the payment of any fee approved by a court for the services of a claimant under Title XVI because the Title does not authorize the Administration to make such a payment.

This attempt to change the rules would certainly seem to run contrary to opposing counsel's statement in their brief that the court should adhere to the reasonable construction of a statute by the administrative agency charged with its implementation. If the situation was so clear, Social Security would not have to come up with another new proposed rule in the Federal Register.

This court should look at the ends to which this highly deserving social legislation is aimed, that is, to obtain adequate benefits for claimants and to adequately provide for attorneys whose employment was made necessary by the Administration's refusal to put the claimants on in the beginning. To do otherwise is simply keeping lawyers from getting compensated for handling Social Security cases, and the end result will be to keep lawyers from accepting Social Security cases and thus, without assistance from attorneys, the claimants would be powerless to protect themselves.

Subfinally, the Social Security Administration has launched a nation-wide media blitz criticizing the high legal fees Social Security lawyers are making (see Appendix F). How can Social Security save fifteen million dollars annually while not placing an undue hardship on the attorney community?

On another point, what is the remedy for an attorney if Social Security miscalculates the benefits by $6,000 and the attorney fee petition has been submitted and paid over two years ago? (see Appendix G).

—o—

CONCLUSION

This Court should refuse to grant a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit since it is clear that the decision sought to be reviewed is a proper decision.

Respectfully submitted,

ANTHONY W. BARTELS
316 South Church
Jonesboro, Arkansas 72401
(501) 972-5000

Counsel for Respondent

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2496

MARY ALICE GALBREATH, APPELLEE

v.

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

(FILED AUGUST 14, 1986)

Before WOLLMAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and LARSON, Senior District Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

The Secretary of Health and Human Services ("Secretary") appeals from the district court's order directing the Secretary to pay an attorney's fee from past-due supplemental security income (SSI) benefits awarded to the attorney's client, Mary Alice Galbreath ("Galbreath"), under Title XVI of the Social Security Act ("Act"). The Secretary argues that the Act does not authorize the withholding of past-due SSI benefits for the payment of attorney's fees. We affirm the district court's order.

Galbreath applied for SSI benefits on May 26, 1982. The Secretary denied Galbreath's application; on August

10, 1983 Galbreath appealed this administrative decision to the federal district court. On February 15, 1985, the district court reversed the Secretary's denial of Galbreath's claim, and the Secretary proceeded to effecuate the court's decision. Galbreath was sent a check dated July 23, 1985 in the amount of $7,954.00. Galbreath's attorney, Anthony W. Bartels, then moved the court for attorney's fees in the amount of $1,988.50, or 25% of Galbreath's past-due benefits. In its order, the district court determined that the amount requested by Bartels was reasonable, and ordered the Secretary "to compute, certify and pay" Bartels his requested fee.

On appeal to this court, the Secretary argues that neither the Act nor the Secretary's regulations authorized the withholding of past-due benefits for payment of attorney's fees in SSI cases, and that therefore the district court was without the power to order the Secretary to withhold attorney's fees from Galbreath's benefits for payment to Bartels. The Secretary asserts that the section of the Act relied on by the district court in its order, 42 U.S.C. Section 406(b)(1), pertains only to attorney's fees for services before the court in Title II (disability benefits) cases, and that no counterpart for section 406(b)(1) exists in Title XVI. Without such statutory authority, the Secretary contends that he is obligated to authorize full payment of SSI benefits, without diverting part of the benefits in payment of an attorney's fee.

Before we reach the merits of the issue in dispute, some discussion of the differences between Titles II and XVI of the Act is warranted. Title II of the Act provides benefits for insured individuals suffering from a disability rendering them unable to engage in substantial gainful activity. 42 U.S.C. Section 423(a) and (d)(1)(A) (1982).

Title XVI, on the other hand, which was enacted in 1972, affords benefits to persons who are aged, blind, or disabled and whose financial resources fall below minimum levels, regardless of whether they have insured status under Title II. 42 U.S.C. Section 1382(a) (1982).

Before 1965, Title II did not expressly authorize a district court to award attorney's fees to a claimant's attorney. In *Celebrezze v. Sparks*, 342 F. 2d 286, 290 (5th Cir. 1965), the Fifth Circuit held that the district court acted within its judicial power in providing that attorney's fees be paid out of past-due benefits recovered by a claimant. The court stated that section 205(g) of the Act, 42 U.S.C. Section 405(g), gave the district court "full judicial power to deal with the litigation * * * including the power * * * to provide for the payment from the past due benefits recovered by the claimant in the litigation of counsel fees for conducting it." 342 F. 2d at 288. The court reasoned that giving the district court the authority to make attorney's fee awards out of past-due benefits would foster the important policy of assuring disability claimants of adequate legal representation. *Id.* at 289. Later in 1965 Congress, "in effect, incorporated the *Sparks* rationale into Title II by an amendment," *Reid v. Heckler*, 735 F. 2d 757, 761 (3d Cir. 1984), which was codified at 42 U.S.C. Section 406(b)(1).

In 1972 Congress enacted Title XVI of the Act. 86 Stat. 1465 (1972) (current version at 42 U.S.C. Sections 1381-1383 (1982)). Although Title XVI incorporates many sections of Title II, section 406(b)(1) is not expressly incorporated, nor does Title XVI make any other provision for the direct payment of attorney's fees for representation before the district court. In regard to attorney's fees

for representation before the agency under Title XVI, the House Ways and Means Committee stated its belief that the "withholding of attorneys fees from (an) individual's benefits * * * * would be contrary to the purpose of the program." H.R. Rep. No. 231, 92d Cong, 2d Sess. 3, reprinted in 1972 US. Code Cong. & Ad. News 4989, 5142.

As enacted, Title XVI called for hearing procedures "the same as under section 405(g) of Title II except that determinations of fact made by the Secretary would be conclusive and not subject to judicial review." *Reid,* 735 F. 2d at 761; 86 Stat. 1476. In 1976, however, Congress amended Title XVI to include judicial review of the Secretary's final determination in SSI cases. 42 U.S.C. Section 1383(c)(3) provides: "The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under Section 405 of this title." Thus the amendment was intended to result in the application of "the same rules of judicial review to the title XVI cases as apply to title II cases." S. Rep. No. 550, 94th Cong., 1st Sess. 2, reprinted in 1975 U.S. Code Cong. & Ad. News 2347, 2350.

With this legislative history in mind, we take a look at those cases that have addressed the question of the district court's authority to award attorney's fees for services before the court in Title XVI cases. The Sixth Circuit, the Northern District of Florida, the Eastern District of Michigan, and the Northern District of Ohio have held that the district court is without authority to order the payment of attorney's fees from past-due SSI benefits. See *McCarthy v. Secretary of Health and Human Services,* 793

F. 2d 741, 744-45 (6th Cir. 1986); *Brown v. Bowen,* — F. Supp. — No. PCA 84-4284—RV, slip op. at 3 (N.D. Fla. May 22, 1986); *Franklin v. Secretary of Health and Human Services,* 525 F. Supp. 398, 399 (E.D. Mich. 1981); *Baim v. Harris,* 515 F. Supp. 227 (N.D. Ohio 1981). In so holding, these courts have relied on the lack of express authority in Title XVI for such fee awards, and especially on the failure of Congress to incorporate into Title XVI section 406(b)(1) of Title II, permitting the withholding of attorney's fees from past-due benefits. Further, in *McCarthy* the Sixth Circuit believed that the House Ways and Means Committee's position that to withhold of attorney's fees from benefits for representation before the agency "would be contrary to the purpose of the program," would apply equally to representation before the court. *McCarthy,* at 744.

The Third Circuit, the Eastern District of Kentucky, the Northern District of New York, the District of Maryland, and the Eastern District of Tennessee have all held that the district court does possess the authority to make an award of attorney's fees in SSI cases. *Reid v. Heckler,* 735 F. 2d at 762; *Mullanix v. Heckler,* 624 F. Supp. 529, 530-31 (E.D. Ky. 1986); *Adams v. Secretary of Health and Human Services,* 596 F. Supp. 449, 453 (N.D.N.Y. 1984); *Dolin v. Harris,* 501 F. Supp. 97, 98 (D. Md. 1980); *Vaughn v. Califano,* 442 F. Supp. 185, 188 (E.D. Tenn. 1977). These courts acknowledge the lack of express statutory authority for a court award of attorney's fee in SSI cases, but look to the legislative history of Title XVI to find that Congress intended the same treatment on representation and attorney fees as that provided for Title II claimants, and that courts possess an implied and inherent power to make

such awards. Just as the Fifth Circuit in *Celebreeze v. Sparks,* 342 F. 2d at 288, held that section 405(g) gave courts the power to provide for the payment of attorney's fees from past due Title II benefits, the Third Circuit in *Reid* reasoned that the 1976 amendment to Title XVI incorporating section 405(g) into Title XVI gives district courts the implied authority to grant attorney's fees in SSI cases. See *Reid,* 735 F. 2d at 761-62 ("(S)ection 405(g) has been carried over into Title XVI and with that provision goes the implied and inherent power of the court set out in the *Sparks* case"). Further, the court in *Vaughn* stated, "An integral part of the court's review under 42 U.S.C. Section 405(g) relates to the attorney's fee provisions of 42 U.S.C. Section 406(b)." 442 F. Supp. at 187. See also *Mullanix,* 624 F. Supp. at 531 (quoting *Vaughn*); *Adams,* 596 F. Supp. at 452 (same).

In response to the Secretary's argument that congress' failure to expressly incorporate Section 406(b) into Title XVI was deliberate and militates against applying its provisions in Title XVI cases, the court in *Vaughn* stated:

> The defendant is obviously correct in its assertion that the Congress has expressly incorporated by reference certain sections of title II into title XVI. See 42 U.S.C. Section 1383(d)(1). However, this incorporation was not a part of the aforementioned 1976 amendment to title XVI, which provided for the judicial review of final administrative determinations denying this category of benefits. These statutory sections were incorporated thereinto by reference long before the Congress acted to grant this Court jurisdiction to review title XVI claims. Accordingly, such expressed incorporation cannot be viewed as a congressional expression that the attorney fee provisions of 42 U.S.C. Section 406(b) should not be applicable to the title

> XVI review procedure. Had the Congress, in passing the 1976 amendments to title XVI, then expressly incorporated by reference certain provisions of title II, but without mentioning Section 406(b), *supra,* then the defendant's contention in this regard might have merit.

442 F. Supp. at 187. The court in *Adams* made a similar response to the Secretary's citation to the House Report on the original Title XVI amendments that stated that withholding attorney's fees for representation before the Secretary in Title XVI cases "would be contrary to the purpose of the program." The court reasoned that "the Secretary's reliance on legislative history concerning the 1972 amendments cannot outweigh the clear legislative intent of the 1976 amendment making SSI cases subject to the same judicial review as disability cases." 596 F. Supp. at 453.

We find the position taken by the courts in *Reid* and *Vaughn* and their progeny, that the district court does have the power to award attorney's fees from past-due SSI benefits, more compelling than the opposite position taken by the Secretary. Absent express statutory prohibition, the district court possesses the inherent power to withhold and certify for payment an attorney's fee from SSI benefits. Congress made it very clear in amending Title XVI in 1976 to incorporate section 405(g) that the scope of judicial review under Title XVI was to be "virtually identical" to that under Title II. See S. Rep. No. 550, 94th Cong., 1st Sess. 2, reprinted in 1975 U.S. Code Cong. & Ad News 2347. Because we think that the authority to provide for the payment of attorney's fees is an integral part of the court's power of judicial review under section 405(g)

and not contrary to the express intent of Congress, we hold that the district court did not err in directing the Secretary to pay attorney Bartels' fee from claimant Galbreath's past-due SSI benefits. In so holding, we acknowledge the conclusions of other courts that this result will promote the important policy of assuring adequate legal representation of SSI claimants. First, an award of fees to successful counsel furthers the congressional goal of providing SSI benefits through judicial review to those claimants who otherwise would not obtain such benefits. See *Reid*, 735 F. 2d at 760, 672; *Mullanix*, 624 F. Supp. at 531; *Adams*, 596 F. Supp. at 453. Second, adoption of the 25% ceiling provides some compensation and hence an incentive to counsel, while simultaneously barring higher fees through private contingency agreements. *Mullanix*, 624 F. Supp. at 531; *Adams*, 596 F. Supp. at 453.

The district court's order is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Civil Action No. J-C-83-223

MARY ALICE GALBREATH, PLAINTIFF

V.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

(FILED OCTOBER 15, 1985)

ORDER

Currently pending before the Court is the Petition for Attorney Fees and Allowance of Costs submitted and filed by the plaintiff's attorney, Anthony W. Bartels. The maximum allowable fee is twenty-five percent of plaintiff's back pay; however, the Court may not unquestionably approve an award solely on the basis of a contingency fee contract. 20 C.F.R. Sections 404.1725 and 404.1730.

In each case the judge must assess the value of the lawyer's services to the client in the judicial proceedings. *MacDonald v. Weinberger*, 512 F. 2d 144, 147 (9th Cir. 1975); *McKittrick v. Gardner*, 378 F. 2d 872 (4th Cir. 1967). The attorney-client agreement is a consideration, but the

final fitting of the fee to the services remains the duty of the court. *Fenix v. Finch*, 436 F. 2d 831 (8th Cir. 1971); *Robinson v. Gardner*, 374 F. 2d 949, 952 (4th Cir. 1967). See also *Blankenship v. Schweiker*, 676 F. 2d 116 (4th Cir. 1982).

In this case the attorney has claimed 33.25 hours for the representation provided at the district court level. The Court does not view this as excessive. In light of counsel's experience, reputation, and ability, the Court finds that $75 is a reasonable hourly rate. However, since the maximum allowable is twenty-five percent of past due benefits, plaintiff's attorney is limited to a fee award of $1,988.50.

Therefore, IT IS ORDERED that an attorney's fee in the amount of $1,988.50 payable from the plaintiff's past due benefits is hereby allowed to Anthony W. Bartels, the plaintiff's attorney, pursuant to 42 U.S.C. Section 406 (b)(1). The defendant is ordered to compute, certify and pay said attorney said sum.

This —— day of October, 1985.

/s/ HENRY WOODS
Henry Woods
U. S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2496

MARY ALICE GALBREATH, APPELLEE

V.

OTIS R. BOWEN, M.D., SECRETARY OF
HEALTH AND HUMAN SERVICES, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF ARKANSAS

(FILED AUGUST 14, 1986)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and argued by counsel.

Upon consideration of the premises, it is hereby adjudged and decreed that the judgment of the district court is affirmed in accordance with the opinion of this Court.

A true copy.

Attest:

/s/ ROBERT D. ST. VRAIN
Clerk, U. S. Court of Appeals,
Eighth Circuit

APPENDIX D

RELEVANT STATUTORY PROVISIONS

Section 205(g) of Title II of the Social Security Act, 42 U.S.C. 405(g), provides in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party * * * may obtain a review of such decision by a civil action * * * brought in the district court of the United States for the judicial district in which the plaintiff resides(.) * * * The Court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive(.)

Section 206(a) of Title II of the Social Security Act, 42 U.S.C. 406(a), provides in pertinent part:

> The Secretary may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under this subchapter, and any agreement in violation of such rules and regulations shall be void. Whenever the Secretary, in any claim before him for benefits under this subchapter, makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for services performed by him in connection with such claim. If as a result of such determination, such claimant is entitled to past-due benefits under this subchapter, the Secretary shall, notwithstanding Section 405(i) of this title, certify for payment (out of such past-due benefits) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 per centum of the total amount of such past-due benefits, (B) the amount of the attorney's fee so fixed, or (C) the amount agreed upon between the claimant and such attorney as the fee for such attorney's services.

Section 206(b)(1) of Title II of the Social Security Act, 42 U.S.C. 406(b)(1), provides:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment and the Secretary may, notwithstanding the provisions of Section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past due benefits. In case of any such judgment, no other fee may be payable to certified for payment for such representation except as provided in this paragraph.

Section 207 of Title II of the Social Security Act, 42 U.S.C. 407, provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Section 1631(c) of Title XVI of the Social Security Act, 42 U.S.C. 1383(c), provides in pertinent part:

> (1) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual

applying for payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. The Secretary shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, if such individual requests a hearing on the matter in disagreement within sixty days after notice of such determination is received, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing affirm, modify, or reverse his findings of fact and such decision. * * *

* * * * * *

(3) The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title.

Section 1631(d) of Title XVI of the Social Security Act, 42 U.S.C. 1383(d), provides in pertinent part:

(1) The provisions of section 407 of this title and subsections (a), (d), (e), and (f) of section 405 of this title shall apply with respect to this part to the same extent as they apply in the case of subchapter II of this chapter.

(2) * * * The Secretary may, by rule and regulation prescribe the maximum fees which may be charged for services performed in connection with any claim

before the Secretary under this subchapter, and any agreement in violation of such rules and regulations shall be void.

APPENDIX E

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 416

Supplemental Security Income for the Aged, Blind, and Disabled; Prohibition on Direct Payment of Fees to Representatives

Agency: Social Security Administration HHS

Action: Notice of proposed rulemaking.

Summary: In these proposed regulations, we are clarifying our current rules on fees for representatives of claimants for supplemental security income (SSI) benefits. We state explicitly that we will not withhold money from the claimant's retroactive SSI benefits to pay a fee directly to the representative. These rules will apply regardless of whether the representative performs the servics before the Social Security Administration (SSA) or before a court.

Date: Comments must be submitted on or before May 18, 1987.

Addresses: Comments should be submitted in writing to the Commissioner of Social Security, Department of Health and Human Services, P.O. Box 1585, Baltimore, Maryland 21203, or delivered to the Office of Regulations, Social Security Administration, 3-A-3 Operations Building, 6401 Security Boulevard, Baltimore, Maryland 21235 between 8:00 a.m. and 4:30 p.m. on regular business days. Comments received may be inspected during these same hours

by making arrangements with the contact person shown below.

For further information contact: Jack Schanberger, Room 3-B-4 Operations Building, 6401 Security Boulevard, Baltimore, Maryland 21235, (301) 594-6785.

Supplementary information: Title XVI of the Social Security Act (the Act) provides in section 1631(d)(2) that the Secretary of Health and Human Services (the Secretary) may prescribe the maximum fee which may be charged for services performed by a representative in connection with any claim before the Secretary for SSI benefits. Section 1631(d)(1) provides that section 207 of Title II applies to Title XVI to the same extent that it applies to title II. Section 207 provides that a person's benefits shall not be transferable or assignable, nor shall they be subject to execution, levy, attachment, garnishment, or other legal process. However, section 1631 is silent on how the fee is to be paid, thereby indicating a Congressional intention that SSA should have no responsibility for direct payment of the fee to the representative from the benefits of the SSI recipient.

In contrast to Title XVI, section 206 of the Act provides that in Title II claims for Old-Age, Survivors, and Disability Insurance benefits (OASDI), we may pay an attorney an amount equal to no more than 25 percent of the claimant's past-due benefits toward the attorney's fee for representing the claimant. Since section 206 creates a statutory right in the attorney to receive payment under Title II, the prohibition in section 207 (see also 20 CFR 404.1820) against transfer or assignment of a beneficiary's right to receive Title II benefit payment does not

apply to the direct payment of approved fees to attorneys under Title II. Section 207 is nonetheless fully applicable to Title XVI by operation of section 1631(d)(1) because, unlike Title II, there is no provision in Title XVI for paying an attorney's fee from past-due benefits.

The absence in Title XVI of a provision for paying a representative's fee from the past-due benefits of a recipient indicates that Congress did not want SSA to withhold any money from an SSI recipient's retroactive benefits to pay his or her representative's prescribed fee. Additionally, it is stated in the legislative history of Title XVI: "Where an individual who has requested a hearing is represented before the Secretary by an attorney, the provisions of cash social security program (pertaining to attorney fees) would be applicable except that there would be no withholding of attorney fees from such individual's benefits. Your committee believes that to withhold such fees would be contrary to the purpose of the program." (H. Rep. No. 231, 92nd Cong. 1st Sess. 156 (1971). Although this statement of intent deals with representation before the Secretary, we believe its intent obviously extends by implication to representation before a court also.

In order to clarify our policy on withholding of representatives' fees in Title XVI cases, we are revising 20 CFR 416.1520 and 416.1528 to provide explicity that we will not withhold an SSI recipient's retroactive benefits to pay a representative's fee because the statute does not authorize us to make such a direct payment and because such withholding violates the immunity of benefits from execution, garnishment, or legal process and the prohibition against their transfer or assignment set forth in section 207 of the Act, as made applicable to Title XVI through section 1631(d)(1) and the regulations that implement sections 207 and 1631(d)(1) codified at 20 CFR 416.533.

We do not believe that our policy will in any way hinder a Title XVI claimant from obtaining legal representation in the presentation of his or her claim. There are several reasons for our belief. First, many Title XVI claimants who wish to appeal an adverse decision by SSA are concurrently filing for both Title II and Title XVI benefits. Our policy is to encourage attorneys to include in their fee petitions their services for both benefits. We then pay up to 25 percent of the net past-due Title II benefits payable toward the approved fee for any services unique to the Title II claim and for services common to both claims. In addition, the nonprofit legal services agencies that represent many Title XVI claimants treat them as indigent persons who qualify for the agencies' services. Finally, these proposed regulations are intended only to state our longstanding policy of not using an SSI beneficiary's retroactive benefits to pay approved fees directly to a representative. Accordingly, these proposed regulations will not in any way impede representatives from collecting their approved fees directly from clients.

Regulatory Procedures

Executive Order 12291

The Secretary has determined that this is not a major rule because none of the threshold criteria described in Executive Order 12291 is met. Therefore, a regulatory impact analysis is not required.

Paperwork Reduction Act

These proposed regulations impose no reporting/recordkeeping requirements requiring clearance by the Office of Management and Budget.

Regulatory Flexibility Act

We certify that these proposed regulations will not, if promulgated, have a significant economic impact on a substantial number of small entities because they affect only the benefit amounts payable to individual recipients. Therefore, a regulatory flexibility analysis as provided in Pub. L. 96-354, the Regulatory Flexibility Act, is not required.

(Catalog of Federal Domestic Assistance Programs No. 13.807, Supplemental Security Income Program)

List of Subjects in 20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Supplemental Security Income (SSI).

Dated: December 15, 1986.

Dorcas R. Hardy,

Commissioner of Social Security.

Approved: February 24, 1987.

Otis B. Bowen, M.D.,

Secretary of Health and Human Services.

PART 416—(AMENDED)

Subpart O of Part 416 of Chapter III of Title 20 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Subpart O is revised to read as follows:

Authority: Secs. 1102 and 1631(d)(1) and (2), Social Security Act; 49 Stat. 647, 86 Stat. 1475; 42 U.S.C. 1302 and 1383.

2. Section 416.1520 is amended by redesignating paragraph (d)(3) as (b)(4) to read as follows:

§ 416.1520 Fee for a representative's services.

(b) • • •

(4) We assume no responsibility for the payment of any fee for a representative's services before the Social Security Administration under Title XVI because that title does not authorize us to make such a payment. In addition, withholding supplemental security income (Title XVI) payments to pay a representative's fee violates the prohibition on transfer or assignment of benefits to someone other than the person eligible for those benefits, or certification of payments to any person claiming such payment by virtue of execution, levy or other legal process, as described in § 416.533.

• • •

3. Section 416.1528 is amended by adding two sentences at the end, to read as follows:

• • •

§ 416.1528 Proceedings before a State or Federal court.

• • • We assume no responsibility for the payment of any fee approved by a court for the services of a representative under Title XVI because that title does not authorize us to make such a payment. In addition, withholding supplemental security income (Title XVI) payments to pay a court-approved fee violates the prohibition on transfer or assignment of benefits to someone other than the person eligible for those benefits, or certification of payments to any person claiming such payment by virtue of execution, levy, or other legal process, as described in § 416.533.

[FR Doc. 87-5679 Filed 3-16-87; 8:45 am]
Billing Code 4190-11-M

App. 23
APPENDIX F

ANC rejects cease-fire/4A● 7 die in high-rise fire/6A● Advertising and hygiene/2B

Heavy rain likely
Details on 2A

Arkansas Gazette.

MONDAY

168th Year—No. 124 © 1987 ARKANSAS GAZETTE COMPANY LITTLE ROCK, MONDAY, MARCH 23, 1987 ★ ★ 25 Cents

High legal fees cited in SS audit

WASHINGTON (UPI) — Lenient hearing officers have ignored regulations and, in effect, allowed private lawyers to bill Social Security disability recipients up to $750 an hour for legal services, costing claimants millions of dollars a year, an agency audit says.

In 1984, the latest year evaluated, persons who were denied benefits and then won appeals paid $23.6 million in unreasonably high fees to attorneys, according to the audit by the Health and Human Services Department's inspector general's office.

As a result, the auditors recommended reforms to more tightly regulate the amount of money that can be charged for legal representation in those types of cases.

Social Security regulations say lawyers should not be paid

(See AUDIT on Page 6A.)

Audit

Continued from Page 1A.

more than $75 an hour for their work in appeals cases, and only slightly more in cases deemed exceptionally complex.

The audit said "vague, complex and inadequate" regulations are allowing lawyers — usually working on a contingency basis where they collect only if they win — to reap up to 25 per cent of any past due benefits owed to claimants.

Administrative law judges are supposed to evaluate fees billed by attorneys to determine their fairness and to make sure the charges do not exceed $3,000 in any single case. But the auditors said the murky regulations and staffing problems had led to lapses in controls.

Hard to regulate

The audit said contingency cases are especially hard to regulate because the amounts attorneys receive vary greatly.

"Our review showed that nearly half of the fee petitions [for legal aid] approved *** equated to hourly rates which were in excess of $75 an hour, a rate above which we consider fees to be excessive," the audit said.

Eileen Bradley, associate commissioner for the office of hearings and appeals, said "attorney fees of $750 an hour might be considered excessive and we intend to focus on ensuring that claimants are represented at a fair price."

As a result of the audit findings, Bradley said, "we see a need to move on this question and plan to tighten up our management" of attorney fees.

When approving fee requests, administrative law judges must consider a variety of factors including the level of competence required and the results the attorney achieved.

The audit charged that hearing officers were giving "perfunctory approval" to fee petitions, instead of objective evaluation.

"The judges usually did not seriously weigh the number of hours and types of services in their evaluations and some were reluctant to question the judgment of fellow attorneys on the fees that were requested," the audit said.

"Conservatively," the audit said, "we estimate that certain changes to improve evaluation criteria could save claimants at least $15 million annually while not placing undue hardship on the attorney community."

Among examples cited, the audit said:

★ A 36-year-old man with back problems won his case and was awarded overdue benefits of $12,192. The law judge reduced the attorney's requested 25 per cent contingency fee by $48 to $3,000 for four hours work, or $750 an hour.

★ Another man, 57, with back problems won $14,076 in past due payments. His attorney charged $3,000 for six hours work, amounting to $500 an hour.

The fees are excessive, the audit said, because the cases are relatively simple to prepare and are "nonadversarial in nature." The audit noted that the government is not represented by attorneys in the hearings.

APPENDIX G

SOCIAL SECURITY BENEFIT INFORMATION

From: Office of Disability Operations
Baltimore, Maryland 21241

Date: April 04, 1987

Claim Number: 430-56-5219 A

EARNESTEEN JARRETT
525 W FORREST
JONESBORO AR 72401

Periodically we reexamine our records to see if there are any additional benefits due. As a result of this examination, your benefit amount has been increased to give credit for additional earnings which were not previously included in computing your benefit.

You will receive a payment shortly after May 02, 1987 for $6,817.60. It will cover benefits due you from March 1984, through April 1987. After that you will receive your new regular monthly payment of $346.00 on this number.

If you are enrolled in the medical insurance part of Medicare and premiums will be deducted from your payment, the figure shown as your new regular monthly rate is the amount payable to you after the Medicare premiums are deducted.

Your right to request a reconsideration of this determination is explained on the back of this notice.

If you have questions about your claim, you may get in touch with any Social Security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this notice with you.

JOINT

APPENDIX

Supreme Court, U.S.
FILED
JUL 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1146

In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARY ALICE GALBREATH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

ANTHONY W. BARTELS
316 South Church St.
Jonesboro, Ark. 72401
(501) 972-5000
Counsel for Respondent

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Petitioner

PETITION FOR A WRIT OF CERTIORARI FILED JANUARY 12, 1987
CERTIORARI GRANTED MAY 4, 1987

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1146

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARY ALICE GALBREATH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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* The relevant opinions of the district court and the court of appeals, and the judgment of the court of appeals are printed in the appendix to the petition for a writ of certiorari and have not been reproduced.

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

J-C-83-223

MARY ALICE GALBREATH, PLAINTIFF

v.

MARGARET HECKLER, SECRETARY,
DEPARTMENT OF HEALTH AND
HUMAN SERVICES, DEFENDANT

DOCKET ENTRIES

DATE	NR	PROCEEDING
8-10-83		COMPLAINT For Review of the Decision of the Social Security Administration; summons executed and returned to the Atty.
10-20-83		MOTION For Extension of Time to answer.
10-20-83		ORDER granting Motion and extending deft's time to answer to and incl. 12/15/83; deft. to file motion for summary judgment by 1/28/84.
1-27-84		ANSWER, together/w transcript of Administrative hearing; a copy of Answer and transcript sent to Magis. Faulkner.
4-30-84		Pltf's. MOTION For Summary Judgment, together/w MEMORANDUM In Support of Plaintiff's Motion For Summary Judgment.
1-28-85		Pltf's RESPONSE To Magistrate's Proposed Memorandum and Order.

DATE	NR	PROCEEDING
1-28-85		Magis's PROPOSED Memo. & Order; objections due by 2/8/85.
2-21-85		MEMORANDUM & ORDER Of Remand.
2-21-85		JUDGMENT Of Remand remanding to Secretary with instructions to allow a period of disability and to award such supplemental security income to the pltf. as she is entitled to receive by law.
7-30-85		MOTION For Attorney's Fee.
10-02-85		Magistrate's PROPOSED Order re Motion for Attorney's Fees; objections due by 10/15/85.
10-03-85		Pltf. Attorney's RESPONSE To U.S. Magistrate's Proposed Order.
10-15-85		ORDER granting Motion for attorney's fee to Anthony W. Bartels, pltf's. atty., in the amt. of $1,988.50.
12-16-85		NOTICE Of Appeal from the order awarding atty. fees entered on October 10, 1985 and filed on Oct. 15, 1985.
9-8-86		OPINION (8USCA)
9-8-86		MANDATE (8USCA) judgt. is affirmed.
1-28-87		NOTICE Of Filing Petition For Certiorari.
5-14-87		LETTER (8USCA) of notification of order of the Supreme Court granting the petition for writ of certiorari.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

85-2496EA

DOCKET ENTRIES

DATE	PROCEEDINGS
1985	
Dec. 20	DOCKETED APPEAL
Dec. 20	Certified copies notice of appeal, docket entries and order of 10/15/85 from District Court (1) lkl
Dec. 20	BRIEFING SCHEDULE: Aplnt DR 12/30/85; Aplee DR 1/9/86; Trans na Clerk's Rec 1/21/86 or Apndx 1/31/86; Brf Aplnt 1/31/86; Brf Aplee 3/3/86
Dec. 27	APPEARANCE for appellee. (2) cm
1986	
Jan. 30	MOTION BY APLNT for ext. of time to file brief – GRANTED TO & INCL. 3/3/86 on 2/4/86 IN PART (3) de
Mar. 3	*BRIEF APPELLANT* w/serv. 2-28-86 & addendum 5 copies (4) pep
Mar. 3	APPEARANCE for appellant (5) pep
Mar. 31	*BRIEF OF APPELLEE*: w/ser 3/27 7 copies (6) sjo
Apr. 7	TO SCREENING (SG)
Apr. 30	MOTION BY APPELLEE to supplement brief and Supplemental Brief. To ct. 5/14. per L.P. w/ser 4/28 5 copies (7) sjo
May 14	ORDER: Motion by appellee to supplement brief is GRANTED. (8) sjo
May 14	**SET FOR ARGUMENT IN ST. PAUL JUNE SESSION.

DATE	PROCEEDINGS
June 10	ARGUED AND SUBMITTED BEFORE JUDGE WOLLMAN, FLOYD R. GIBSON AND LARSON. Janet Isak Hawley, for appellant. Counsel for appellee waives argument. RECORDED. In St. Paul, Minnesota, rh.
June 27	RECEIVED 28(j) from appellant's counsel (to court 7/1)
July 1	RECEIVED 28(j) from appellant's counsel (to court)
Aug. 14	OPINION BY FLOYD R. GIBSON PUBLISHED (9) jp
Aug. 14	JUDGMENT: Judgment of the district court is affirmed in accordance with the opinion of this Court. (10) jp
Aug. 20	BILL OF COSTS FILED BY appellee. W/service (11) rmh
Sept. 4	MANDATE ISSUED. rmh.
Sept. 11	RECEIPT FOR MANDATE. (12) rmh
Nov. 6	RECD notification fm. Sup. Ct. the time for filing cert. was extended to and inc. 1/11/87
1987	
Jan. 21	NOTICE OF FILING of pet. for writ of cert. to the Sup. Ct. of the U.S. as case no. 86-1146 date 1/12/87 (13) pep
Recd.	
Mar. 3	APPENDIX (5 Copies)
May 8	CERTIFIED COPY OF ORDER of the Sup. Ct. of the U.S. *granting* certiorari in case no. 86-1146 dated 5/4/87

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

No. J-C-83-223

MARY ALICE GALBREATH, PLAINTIFF

v.

MARGARET HECKLER, SECRETARY,
OF HEALTH AND HUMAN SERVICES, DEFENDANT

MOTION FOR ATTORNEY'S FEES

[FILED JULY 30, 1985]

TO: Hon. Henry Woods
United States District Judge
United States Courthouse and Post Office
Little Rock, Arkansas 72201

Comes, Anthony W. Bartels, and makes this Motion for Attorney's Fees, and states:

1. Attached is a Fee Petition and an Itemized Billing showing time and expenses as Exhibit "A" and "B."

2. The attorney and client had a contingent fee contract of ¼th of past due benefits plus expenses, a copy of which is attached to this Motion as Exhibit "C."

WHEREFORE, Anthony W. Bartels, prays that this Court approve the fee in the amount of $1,988.50, which is ¼ of claimant's past due benefits, for services rendered, plus expenses incurred in the amount of $6.25 for a total of $1,994.75.

Respectfully submitted,

/s/ ANTHONY W. BARTELS

Anthony W. Bartels
Attorney at Law
316 South Church
Jonesboro, Arkansas 72401
(501) 972-5000

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

TOE 410

Form Approved
OMB No. 0960-0104

PETITION TO OBTAIN APPROVAL OF A FEE FOR REPRESENTING A CLAIMANT BEFORE THE SOCIAL SECURITY ADMINISTRATION

PLEASE NOTE INFORMATION ON THE REVERSE

PAPERWORK/PRIVACY ACT NOTICE: While your response to this request is voluntary, no fee may be approved unless all the information requested by this form has been received. The information will be used to determine a fair value for services you rendered to the claimant named below, as provided in section 206 of the Social Security Act (42 U.S.C. 406).

I request approval to charge a fee of → Fee $ 1,236.50 (1/4 past due benefits)

for services performed as the representative of → MR / MRS / MS Ms. Mary Alice Galbreath

in a claim or proceeding before the Social Security Administration.

Type of Claim(s): Title XVI

Enter the name and address of the person on whose Social Security record claim is based

Mary Alice Galbreath
Box 233
Hoxie, Arkansas 72433

Enter the Social Security number of person on whose record claim is based

429-66-4506

THE INFORMATION BELOW IS FURNISHED IN SUPPORT OF THIS PETITION

1. My services as a representative → Began (month, day, year): 4/29/83 Ended (month, day, year): 3/20/85

2. Itemization of services rendered before the Social Security Administration

DATE (mo., day, yr.)	(Itemize each meeting, conference, item of correspondence, telephone call, and each activity engaged in, such as research, preparation of a brief, attendance at a hearing, travel, etc., related to your services as representative in this case.)	ACTUAL TIME SPENT
	SEE ITEMIZED BILLING ATTACHED	
	If more space is needed, attach separate sheet — TOTAL HOURS	49 hours

3. Have you and your client entered into a fee agreement for services before SSA? ☒ YES ☐ NO
(If "Yes," please specify the amount (or the agreed-upon formula).) 1/4 pst due benefits $1,083.50

4. Have you received, or do you expect to receive, any payment toward your fee from funds held in an escrow or trust account, or from any other source? *(If "Yes," please specify the amount.)* ☐ YES ☒ NO
$

5. Have you received, or do you expect to receive, reimbursement for expenses you incurred? ☒ YES ☐ NO
(If "Yes," please itemize):
$
$
See itemized billing attached $6.25

6. Did you render any services relating to this matter before any State or Federal Court? ☒ YES ☐ NO
(If "Yes," what fee did you or will you charge for services in connection with the court proceeding?)
$

I certify that the above information is true and correct to the best of my knowledge and belief. I further certify that I have furnished a copy of this petition and any attachments to the person(s) for whom the above services were performed. NOTE: Only the individual appointed as the representative may sign this fee petition.

Signature of Representative	Date	Address
SIGNED BY	7/30/85	316 South Church Jonesboro, Arkansas 72401
Typed or printed name of party		Telephone No. and Area Code
Anthony M. Bartola, Attorney at Law		(501) 9725000

BEST AVAILABLE COPY

MARY A. GALBREATH (DORRIS)
SOCIAL SECURITY BILLING
SSN: 429-66-4506

DATE	SERVICE RENDERED	TIME
4/29/83	Office conference with client; Discussed Social Security case with client; Partially reviewed claimant's file from previous attorney; Filled out office and Social Security forms for client.	3 hrs.
5/1/83	Completed the review of claimant's file from previous attorney.	2 hrs.
5/2/83	Set up file; Completed Request for Review of Hearing Decision/ Order on behalf of client; Wrote letter to Social Security with form enclosed; Sent carbon copy to client; Hand delivered letter to SSA.	1 hr.
5/6/86	Received letter with reference to change of address; Updated address information in file	20 min.
5/9/83	Received telephone call from Larry Steele with reference to client.	20 min.
6/23/83	Received letter with enclosure from client—reviewed.	20 min.
6/28/83	Reviewed file; Wrote letter to client.	45 min.
7/5/83	Received telephone call from client —discussed case	15 min.
7/10/83	Received letter with several enclosures from client—reviewed.	30 min.
7/11/83	Wrote letter to Credit Bureau of Jonesboro on behalf of client; Sent carbon copy of letter to client.	40 min.

DATE	SERVICE RENDERED	TIME
7/27/83	Received filed copy of form from SSA – filed.	15 min.
8/8/83	Received letter from client with enclosed Action of Appeals Council on Request for Review; Reviewed Appeals Council decision; Did research; Reviewed file.	2 hrs.
6/9/83	Did research; Prepared Complaint, CCS, Summons, and 2 page letter to U.S. Attorney, U.S. Attorney General, and Secretary (3 originals and two copies); Walked to Ed. Building to file pleadings; Walked to Post Office to mail certified letters.	5 hrs.
8/16/83	Received RRR card from George Proctor – filed.	15 min.
8/17/83	Received RRR card from Margaret Heckler – filed.	15 min.
8/19/83	Received RRR card from Williams [*sic*] Smith – filed.	15 min.
8/20/83	Prepared Affidavit of Service	30 min.
9/29/83	Reviewed file; Did research.	2 hrs.
10/20/83	Received Motion for Extension of Time from Assistant U.S. Attorney, Chalk S. Mitchell – reviewed.	15 min.
10/21/83	Received Order from the clerk.	15 min.
11/15/83	Reviewed file.	30 min.
12/15/83	Reviewed file.	1 hr.
1/26/84	Received Answer and Transcript – reviewed transcript; Did research.	2 hrs.

DATE	SERVICE RENDERED	TIME
2/1/84	Did research in preparation for Summary Judgment.	2 hrs.
3/15/84	Reviewed file.	1 hr.
4/30/84	Did research; Prepared Motion for Summary Judgment and Memorandum In Support of Motion for Summary Judgment; Filed the same; Wrote letter to Chalk S. Mitchell with copy of pleadings enclosed; Sent carbon copy of the letter to client	6 hrs.
5/28/84	Received letter from client – reviewed.	30 min.
6/15/84	Reviewed file.	30 min.
7/20/84	Reviewed file.	1 hr.
8/15/84	Reviewed file.	30 min.
9/6/84	Received letter from client.	15 min.
9/26/84	Received telephone call from client – discussed case with client.	15 min.
9/28/84	Received telephone call from client.	15 min.
10/1/84	Received telephone call from client.	15 min.
10/29/84	Received telephone call from client.	15 min.
11/14/84	Received letter from client.	20 min.
12/17/84	Received letter from client.	20 min.
12/18/84	Wrote letter to client with enclossure.	30 min.
1/25/85	Received Magistrate's Proposed Memorandum and Order along with cover letter – reviewed; Did research; Reviewed file.	2 hrs.

DATE	SERVICE RENDERED	TIME
1/26/85	Did research; Prepared plaintiff's Response to Proposed Memorandum and Order; Filed same; Wrote letter to Assistant U.S. Attorney with copy of brief enclosed; Sent carbon copy of the letter to client.	2 hrs.
2/22/85	Received filed copy of Judgement signed by Judge Woods with attached Memorandum and Order—reviewed.	1 hr.
3/20/85	Reviewed file; Worked on billing.	4 hrs.
	Post file closing work.	2 hrs.
		30 min.
	TOTAL TIME	49 hrs.

EXPENSES:

25 PHOTOCOPIES AT 24¢ PER COPY $6.25

Social Security Contract

This legal contract for professional services as an attorney entered into this 29 day of April, 1983, at Jonesboro, Arkansas by Anthony W. Bartels, Attorney, and Mary Alice Galbreath—, Client.

Mary Alice Galbreath retains Anthony W. Bartels to represent him (her) as his (her) Attorney at Law to settle, adjust, file and prosecute at the hearing level or in the proper courts, or otherwise dispose of, his (her) claim against the Social Security Administration for (1) disability income, (2) Social Security Supplemental Income, (3) Medicare Benefits, and (4) .....

The client agrees to pay his (her) attorney a reasonable fee for his services which will be ¼ of past due benefits that said client may recover of collect on his (her) claims or a fee of $_____.

The costs and necessary disbursements are to be advanced by client or charged to the client and shall be deducted from any settlement or recovery before computation of fee. Client authorizes his (her) attorney to charge all long distance telephone calls to his (her) phone number, which is 886-6158.

It is agreed that the attorney shall have all general, promissory or retaining liens and all special or charging liens known to the law.

It is agreed that the attorney may retain his share of the amount finally collected for his services. But, the Social Security Administration will make final approval of the fee.

The client agrees that he (she) will make no settlement except with the advice and consent and presence of his (her) attorney.

It is agreed that the attorney has made no guarantee regarding successful termination of said action. The at-

BEST AVAILABLE COPY

torney accepts said employment on the condition mentioned above and agrees to exercise reasonable skill and diligence in presenting same.

/s/ MARY ALICE GALBREATH
Mary Alice Galbreath, Client

/s/ ANTHONY W. BARTELS
Anthony W. Bartels, Attorney

State of Arkansas *
* ss
County of Craighead *

Subscribed and sworn before me this
29 day of April, 1983

Commission Expires:
9-4-84

/s/ [illegible]
Notary Public

Supreme Court of the United States

No. 86-1146

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARY ALICE GALBREATH

ORDER ALLOWING CERTIORARI. *Filed May 4, 1987.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Eighth Circuit* is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40513

PETITIONER'S

BRIEF

(4)

No. 86-1146

Supreme Court, U.S.
FILED
JUL 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARY ALICE GALBREATH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

RICHARD J. LAZARUS
Assistant to the Solicitor General

WILLIAM G. KANTER
JEFFRICA JENKINS LEE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

49pp

QUESTION PRESENTED

Title XVI of the Social Security Act, 42 U.S.C. (& Supp. III) 1381-1383, provides supplemental security income (SSI) benefits to financially needy persons who are aged, blind, or disabled. The question presented is whether federal courts may direct the Secretary of Health and Human Services to withhold attorney's fees from court-ordered past-due SSI benefits and to pay those fees directly to the needy person's attorney.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1146

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARY ALICE GALBREATH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 799 F.2d 370. The opinion of the district court (Pet. App. 9a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a) was entered on August 14, 1986. On November 3, 1986, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including January 11, 1987 (a Sunday). The petition was filed on January 12, 1987, and was granted on May 4, 1987 (J.A. 13). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent statutory provisions are set forth at Pet. App. 12a-15a.

STATEMENT

This case concerns Title XVI of the Social Security Act, 42 U.S.C. (& Supp. III) 1381-1383, particularly its relationship to Title II of that Act, 42 U.S.C. (& Supp. III) 401 *et seq.* Title II is one of the earliest federal social security programs. Originally enacted in 1935, it provides old-age, survivor, and disability benefits for insured individuals. Title II benefits do not depend on a showing of financial need. See 42 U.S.C. (& Supp. III) 403, 423. Title XVI is a relatively new social security program and, unlike Title II, it is a welfare program. It provides supplemental security income (SSI) benefits to persons who are aged, blind, or disabled *and* who are financially needy. See 42 U.S.C. (& Supp. III) 1382(a). An individual's Title II benefits, if any, are included in his income for purposes of determining his financial eligibility for Title XVI benefits. See 42 U.S.C. (Supp. III) 1382a(a)(2)(B); 42 U.S.C. 1382(c)(3). The precise question here is whether 42 U.S.C. 406(b)(1), a provision of Title II authorizing attorney's fees to be withheld from court-ordered past-due disability benefits, has any application in Title XVI, which contains no parallel provision.

1. In August 1983, after the Secretary had denied her application for SSI benefits under Title XVI, respondent brought this suit in federal district court challenging the Secretary's determination (Pet. App. 2a). In February 1985, the district court reversed the Secretary's decision and ordered that SSI benefits, including past-due benefits, be paid to respondent. The Secretary accordingly mailed respondent a check for $7,954, the full amount of her past-due benefits, in July 1985 (*id.* at 2a, 9a-10a).

Respondent's lawyer subsequently moved the district court for an award of attorney's fees (J.A. 5-12). On October 15, 1985, the district court ordered "that an attorney's fee in the amount of $1,988.50 payable from [respondent's] past due benefits is hereby allowed to * * * [her] attorney, pursuant to 42 U.S.C. § 406(b)(1)" (Pet. App. 10a). Section 406(b)(1) provides that, where a court orders the payment of disability benefits under Title II, "the court may determine and allow as part of its judgment a reasonable [attorney's] fee * * *, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled." That section further provides that the attorney's fees are to be paid "out of, and not in addition to, the amount of such past-due benefits." Relying on that statute, the district court ordered the Secretary to "compute, certify and pay" out of respondent's past-due Title XVI benefits a fee to her lawyer in the amount of $1,988.50—25% of the amount to which she was entitled (Pet. App. 10a).[1]

2. The court of appeals affirmed (Pet. App. 1a-8a). It acknowledged (*id.* at 7a-8a) that Title XVI, unlike Title II, nowhere explicitly authorizes a district court to order that the Secretary reduce a claimant's past-due SSI benefits in order to provide for the payment of attorney's fees. The court further acknowledged that Congress had expressly determined not to allow the Secretary to withhold attorney's fees from past-due SSI benefits in *administrative* proceedings—something Title II also permits (see 42 U.S.C. 406(a))—because " 'withholding of attorney fees from [an] individual's benefits * * * would be contrary to the purpose of the [Title XVI] program' " (Pet. App. 4a, quoting H.R. Rep. 92-231, 92d Cong., 1st Sess. 156

[1] Because the Secretary had previously paid respondent the full amount of her past-due benefits (Pet. App. 2a), and because 42 U.S.C. 406(b)(1) states that an award of attorney's fees must be paid "out of" past-due benefits, it would be necessary for the Secretary to recoup $1,988.50 from respondent in order to comply with the district court's directive. See 42 U.S.C. (Supp. III) 1383(b) (authorizing HHS to recoup erroneous overpayments of SSI benefits). Respondent might be entitled to a waiver if, for instance, recoupment would "be against equity or good conscience" (see *ibid.*).

(1971)). And the court acknowledged (Pet. App. 4a) that Congress, while incorporating many provisions of Title II into Title XVI by reference, had failed to incorporate the provision (42 U.S.C. 406(b)(1)) upon which the district court predicated its decision.

The court of appeals nevertheless concluded that, "[a]bsent express statutory prohibition, [a] district court possesses the inherent power to withhold and certify for payment an attorney's fee from SSI benefits," stating that such authority "is an integral part of the court's power of judicial review under [42 U.S.C.] 405(g)" (Pet. App. 7a-8a). The court noted that Congress in 1976 had amended Title XVI so as to incorporate Section 405(g) therein; adopting the reasoning of the Third Circuit in *Reid* v. *Heckler*, 735 F.2d 757, 761-762 (1984), the court viewed this 1976 amendment as implicitly granting the district courts authority to withhold attorney's fees in SSI cases. Pet. App. 6a-7a. The court stated (Pet. App. 8a) that its holding "will promote the important policy of assuring adequate legal representation of SSI claimants."[2]

SUMMARY OF ARGUMENT

Federal courts may not direct the Secretary of Health and Human Services to make an up-front reduction in a claimant's past-due SSI benefits in order to provide for the direct payment of an attorney's fee to the claimant's lawyer. Title XVI benefits, unlike Title II benefits, are based on the claimant's financial need. And whereas Title II expressly authorizes the Secretary to withhold attorney's

[2] Since this Court granted certiorari, the Seventh Circuit in *Howard* v. *Bowen*, No. 86-2014 (July 1, 1987), has joined the Sixth Circuit in *McCarthy* v. *Secretary of Health & Human Services*, 793 F.2d 741 (1986), and the Fourth Circuit in dictum in *Motley* v. *Heckler*, 800 F.2d 1253, 1255 (1986) (per curiam), in rejecting the view of the Eighth and Third Circuits and in endorsing the Secretary's construction of Title XVI.

fees from a claimant's past-due benefits, Title XVI includes no such explicit authority. Rather, Congress has decided to leave it to the SSI recipient and his lawyer to arrange for the latter's compensation in some less burdensome fashion, such as payment in installments over an extended period of time.

The legislative history of Title XVI reveals that Congress deliberately omitted withholding authority from that title. Congress considered, yet declined to adopt, a proposal that would have incorporated Section 406(b), the withholding provision of Title II, into Title XVI. Instead, Congress modelled the relevant Title XVI provision on a much earlier version of Section 406—the version that predated Congress's 1965 amendment of that section to include withholding authority. Congress determined that withholding of past-due benefits in the context of Title XVI administrative proceedings "would be contrary to the purpose of the program" (H.R. Rep. 92-231, 92d Cong., 1st Sess. 156 (1971)), presumably because it could impose hardships on recipients who are by definition below the basic subsistence level. The same rationale fully supports what we submit to be Congress's decision not to allow withholding of attorney's fees in Title XVI judicial proceedings.

Respondent concedes that Title XVI, when first enacted in 1972, did not authorize withholding of past-due benefits for payment of attorney's fees. Respondent asserts, rather, that a 1976 amendment to Title XVI—an amendment that made agency factual findings subject to judicial review to the same extent as in Title II—had the incidental effect of authorizing withholding of attorney's fees in Title XVI for the first time. But the sole effect of the 1976 amendment was to make the Secretary's factual findings in SSI cases judicially reviewable, whereas such findings had previously been final and conclusive. There is no suggestion in either the language or legislative history of the amendment

to support respondent's claim that it also touched on the Secretary's withholding authority. Indeed, because the judicial review provision of Title II that was incorporated into Title XVI by the 1976 amendment (viz., Section 405(g)), is different from the Title II provision that pertains to withholding authority (viz., Section 406(b)), respondent's claim that Congress intended by that amendment to do sub silentio what it specifically declined to do in 1972—incorporate Title II's withholding provision into Title XVI—is simply untenable.

ARGUMENT

TITLE XVI OF THE SOCIAL SECURITY ACT DOES NOT AUTHORIZE FEDERAL COURTS TO DIRECT THE SECRETARY TO WITHHOLD ATTORNEY'S FEES FROM COURT-ORDERED PAST-DUE SSI BENEFITS FOR DIRECT PAYMENT TO THE CLAIMANT'S LAWYER

The decision of the court of appeals incorporates into Title XVI by judicial fiat a provision of Title II that Congress specifically declined to incorporate by legislative enactment. Congress considered and rejected the option of conferring on the federal courts in Title XVI, as it had conferred upon them in Title II, the authority to direct withholding of a claimant's past-due benefits for payment as an attorney's fee. Congress determined, contrary to the policy arguments offered by the court of appeals and by respondent,[3] that such a reduction of benefits to financially needy persons "would be contrary to the purpose of the

[3] In a sense, there are two different respondents in this case—Galbreath, the claimant, and Bartels, her lawyer. Their interests are not necessarily coincident, because attorney's fees under Section 406(b) must normally be paid "out of" the claimant's past-due benefits (see note 1, *supra*). For the sake of simplicity, however, we will follow the practice of the courts below and refer to "respondent" in the singular; as so used, the term should be thought primarily to represent the interests of the lawyer.

[Title XVI] program" (H.R. Rep. 92-231, 92d Cong., 1st Sess. 156 (1971)). The Secretary's construction of the statute properly defers to this legislative judgment and is consistent with the language and structure of Title XVI. The decision of the court of appeals should therefore be reversed.

A. The Language, Structure And Legislative History Of Title XVI Show That Congress Has Not Authorized Withholding Of Past-Due SSI Benefits For Payment As Attorney's Fees

1. Title XVI nowhere explicitly authorizes a district court to order the Secretary to withhold a portion of a claimant's past-due SSI benefits for payment of an attorney's fee directly to the claimant's lawyer. A comparison of the language and structure of Titles II and XVI, moreover, belies any assertion that Congress implicitly intended to allow, let alone to require, such withholding by the Secretary in derogation of a claimant's basic subsistence needs.

a. Since its enactment in 1935, Title II has generally barred the assignment to another person of an individual's social security benefits. Social Security Act of 1935, ch. 531, § 207, 49 Stat. 624; 42 U.S.C. (Supp. III) 407. In 1939, Congress first authorized the Secretary (then the Social Security Board) to regulate the practice of attorneys and agents representing claimants in Title II cases. Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1372.[4] In thus authorizing regulation of attorneys prac-

[4] Congress enacted the 1939 amendments following this Court's decision upholding the constitutionality of the social security program (see *Helvering* v. *Davis*, 301 U.S. 619, 634-636 (1937)), and following publication of a 1939 report by the Social Security Board recommending changes in the program (see *Report of the Social Security Board*, H.R. Doc. 110, 76th Cong., 1st Sess. (1939)). The 1939 amendments extensively revised the 1935 law, extending Title II to include not only an insurance program for the aged, but also an insurance program for survivor's benefits (§ 201, 53 Stat. 1362; H.R. Rep. 728,

ticing before the agency, however, Congress did not lift the bar on assignment of benefits so as to authorize the withholding of fees. Rather, Section 406 as added to Title II in 1939 simply authorized the Board to regulate the practice of claimants' representatives and provided that "[t]he Board may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before [it]" (§ 201, 53 Stat. 1372; 42 U.S.C. (1940 ed.) 406). Accompanying legislative reports explained the purpose of the addition: "While it is not contemplated that the services of an agent or attorney will be necessary in presenting the vast majority of claims, the experience of other agencies would indicate that where such services are performed the fees charged therefor should be subject to regulation by the Board, and it is so provided." H.R. Rep. 728, *supra*, at 44-45; S. Rep. 734, 76th Cong., 1st Sess. 53 (1939).[5]

76th Cong., 1st Sess. 2, 5-18 (1939); S. Rep. 734, 76th Cong., 1st Sess. 2, 8-20 (1939)). The disability program was added to Title II in 1956 (Social Security Amendments of 1956, ch. 836, §§ 101-103, 70 Stat. 807-824). Most relevant for present purposes, Congress in 1939 accepted the Social Security Board's recommendation that the Board regulate the practice of individuals representing claimants before it. *Report of the Social Security Board*, H.R. Doc. 110, *supra*, at 12-13; H.R. Rep. 728, *supra*, at 19, 20-21.

[5] The 1939 reports both referred to a then-existing statute that authorized the Secretary of the Treasury to regulate the conduct of attorneys appearing in certain administrative proceedings; the statute in question did not explicitly authorize the Treasury Secretary to regulate the amount of fees charged. See H.R. Rep. 728, *supra*, at 44-45 (citing 5 U.S.C. (1934 ed.) 261); S. Rep. 734, *supra*, at 53 (same). The Treasury provision, which was enacted in 1884 (Act of July 7, 1884, ch. 334, § 3, 23 Stat. 258-259), appears to have its roots in language enacted by Congress earlier that same year to allow "the Secretary of the Interior [to] prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department * * *" (Act of July 4, 1884, ch. 181, § 5, 23 Stat. 101). The pension provision was part of broader legislation con-

It was not until 1965 that Congress first authorized the Secretary in Title II cases to withhold a portion of a claimant's past-due benefits for payment as an attorney's fee. Social Security Act Amendments of 1965, Pub. L. No. 89-97, § 332, 79 Stat. 403. That authorization was accomplished by adding to Section 406 a new subsection (b). It empowers a court, when a claimant has prevailed in judicial proceedings against the Secretary, to allow as part of its judgment a reasonable fee, "not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." 42 U.S.C. 406(b)(1). Section 406(b) also provides that the Secretary may "certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits" (*ibid.*). Congress placed a statutory ceiling on fees in 1965 because of its concern "that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in Federal district court actions arising under the social security program" (S. Rep. 404, 89th Cong., 1st Sess. Pt. I, at 122 (1965)). Congress included withholding authority "to assure the payment of the fee allowed by the court" (*ibid.*).

In 1967, Congress amended Section 406(a) to provide the Secretary with similar authority over attorney's fees in Title II administrative proceedings. Social Security

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cerned with regulation of the practice of attorneys representing claimants before the Pension Office; under that legislation, the Pension Office was authorized both to regulate the amount of fees and to withhold a portion of past-due pension benefits for payment as an attorney's fee directly to the pensioner's lawyer. The latter provision, which was first enacted in 1870, proved controversial; it was repealed in 1878, only to be reinstated in 1884. See Act of July 4, 1884, ch. 181, §§ 2, 3 and 4, 23 Stat. 99-101; Act of June 20, 1878, ch. 367, 20 Stat. 243; Rev. Stat. §§ 4768-4769, 4784-4786 (1878 ed.); H.R. Rep. 1910, 47th Cong., 2d Sess. 1-3 (1883); see also *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 321-322 (1985); *id.* at 359-360 nn. 1-3 (Stevens, J., dissenting).

Amendments of 1967, Pub. L. No. 90-248, § 173, 81 Stat. 877. As amended in 1967, Section 406(a) requires the Secretary to fix a reasonable attorney's fee whenever he makes a determination favorable to a claimant who was represented by an attorney before the agency. Section 406(a) further authorizes the Secretary to withhold a portion of a successful claimant's past-due benefits for payment of a fee directly to his or her lawyer. 42 U.S.C. 406(a); see H.R. Rep. 1030, 90th Cong., 1st Sess. 55 (1967).[6]

b. Title XVI of the Social Security Act, which established the SSI program, was enacted in substantially its present form in 1972. Social Security Amendments of 1972, Pub. L. No. 92-603, §§ 301-306, 86 Stat. 1465-1485. When enacting Title XVI, and when amending it in 1976, Congress incorporated into it selected provisions of Title II, including the bar on assignment of individual benefits. See, *e.g.*, 42 U.S.C. 1383(c)(3) (cross-referring to Section 405(g)); 42 U.S.C. (Supp. III) 1383(d)(1) (cross-referring to Section 407 and to other subsections of Section 405). On neither occasion, however, did Congress incorporate into Title XVI the provisions of Title II—*i.e.*, the fifth and sixth sentences of Section 406(a) and Section 406(b)(1)—that authorize the withholding of a claimant's past-due benefits for payment as attorney's fees. Rather, the only reference to attorney's fees in Title XVI is found at 42 U.S.C. 1383(d)(2), which states that "[t]he Secretary may, by rule and regulation, prescribe the maximun fees which may be charged for services performed in connec-

[6] Under Section 406(a), the Secretary is required to "certify for payment (out of such past-due benefits) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 per centum of the total amount of such past-due benefits, (B) the amount of the attorney's fee so fixed, or (C) the amount agreed upon between the claimant and such attorney as the fee for such attorney's services."

tion with any claim before the Secretary * * *." This latter sentence is taken verbatim from Section 406(a). Compare 42 U.S.C. 1383(d)(2) (fourth sentence) with 42 U.S.C. 406(a) (fourth sentence).

In enacting Title XVI, therefore, Congress has transferred to it one, but only one, of Title II's provisions respecting attorney's fees. Thus, while incorporating in Section 1383(d)(2) the portion of Section 406(a) that authorizes the Secretary to prescribe maximum fees in connection with administrative proceedings, Congress has omitted from Section 1383(d)(2) the text of both the 1965 and the 1967 amendments to Section 406—set forth in the next two sentences of Section 406(a) and in Section 406(b)(1)—which provide for withholding and payment of attorney's fees in Title II administrative and judicial proceedings. As a result, the relevant language of Section 1383(d)(2) is identical to that of Section 406 as originally enacted by Congress in 1939—a version of the statute that included no provision for the withholding of attorney's fees.

2. The legislative history of Title XVI confirms that Congress acted quite deliberately in thus omitting withholding authority from Title XVI. The legislative history reveals that Congress considered and declined to adopt a version of Title XVI under which that Title would have incorporated Section 406 in its entirety. Indeed, the legislative history shows that Congress, in enacting the present version of Title XVI in 1972, purposefully modified the text of prior bills so as to delete the withholding authority contained in Title II. And examination of subsequent legislative action shows that Congress since 1972 has resisted efforts to amend Title XVI to achieve the very result sought by respondent and ordered by the court of appeals.

a. Although certain aspects of Title XVI date back many years, the legislative history of that title, as we now know it, properly begins in 1969. The Administration in

that year proposed a comprehensive revision of the social security laws. At the time, Title XVI provided federal monies "[f]or the purpose * * * of enabling each State * * * to furnish financial assistance to needy individuals who are 65 years of age or over, are blind, or are 18 years of age or over and permanently and totally disabled" (42 U.S.C. (1964 ed.) 1381). As thus constituted, Title XVI largely overlapped with programs established by three other titles of the Social Security Act: Title I, which provided grants to allow states to furnish assistance "to aged needy individuals"; Title X, which provided grants for similar state programs to assist the blind; and Title XIV, which provided grants for similar state programs to assist the disabled.[7]

The Administration proposed in 1969 to repeal Titles I, X and XIV, and to retain Title XVI as a federally-financed, state-administered program. See *Social Security and Welfare Proposals: Hearings Before the House Comm. on Ways and Means,* 91st Cong., 1st Sess. Pt. 1,

[7] Titles I and X had been included in the Act since 1935. See Social Security Act of 1935, ch. 531, § 1, 49 Stat. 620 (providing grants to "enable each State to furnish financial assistance * * * to aged needy individuals * * * "); *id.* § 1001, at 645 (providing grants to enable "each State to furnish financial assistance * * * to needy individuals who are blind * * * "). Title XIV was added in 1950. Social Security Act Amendments of 1950, ch. 809, § 351, 64 Stat. 555 (establishing a federally-financed, state-administered program "[f]or the purpose of enabling each state to furnish financial assistance * * * to needy individuals eighteen years of age or older who are permanently and totally disabled"). Title XVI was added in 1963, but as then enacted it simply offered the States the option of consolidating the various programs previously covered by Titles, I, X and XIV. See Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 141, 76 Stat. 197-205. Thus, the 1962 law retained those earlier titles, but ensured against double-dipping by including in Title XVI a proviso that no aid would be provided thereunder to any individual with respect to any period during which he was receiving assistance under a state program funded by Title I, X or XIV. See Pub. L. No. 87-543, § 141, 76 Stat. 198. It was this version of Title XVI that was before Congress in 1969.

at 60-63, 87-96 (1969) [hereinafter *House Hearings*]. The President also proposed to repeal the Aid to Families with Dependent Children (AFDC) program, 42 U.S.C. (1964 ed.) 601 *et seq.*, and to establish in its place a "family assistance plan" to be administered exclusively by the federal government (*House Hearings* 49-60, 67-86). The administrative provisions of the proposed "family assistance plan" were closely modelled on those of Title II. Specifically, the President's proposal by its terms incorporated all of Section 406 into the new program. See *House Hearings* 71 ("The provisions of sections [406] and [407] * * * shall apply with respect to this part to the same extent as they apply in the case of title II.").

In March 1970, Representative Mills introduced H.R. 16311, the "Family Assistance Act of 1970." 116 Cong. Rec. 6220 (1970). Like the President's proposal, H.R. 16311 called for retention of Title XVI as a federally-financed, state-administered program and sought repeal of Titles I, X and XIV; it also advocated replacement of the AFDC program with a "family assistance plan," to be administered solely by the federal government. See H.R. 16311, 91st Cong., 2d Sess. (1970); 116 Cong. Rec. 11879 (1970). Representative Mills' bill did differ from the Administration's proposal in one major respect, for it sought a general increase in welfare benefits. See 116 Cong. Rec. 11879, 11882 (1970). But the version of H.R. 16311 that eventually passed the House followed the President's proposal in that it expressly incorporated Section 406 in its entirety into the "family assistance plan." See 116 Cong. Rec. 12106 (1970); H.R. Rep. 91-904, 91st Cong., 2d Sess. 58 (1970).

In the Senate, Senator Ribicoff proposed an amendment to H.R. 16311. This amendment would have established in Title XVI a national program of financial assistance to needy individuals who were aged, blind, and disabled, to be administered, like the proposed "family

assistance plan," by the federal government. See 116 Cong. Rec. 12326-12329, 12340 (1970) (Sen. Ribicoff).[8] To convert Title XVI into a federally-administered program, Senator Ribicoff's proposal borrowed language from that portion of H.R. 16311 applicable to the "family assistance plan," including the latter's incorporation of Section 406. Hence, under the Ribicoff proposal, Section 406 in its entirety would have been incorporated from Title II into the new Title XVI, and the withholding of past-due benefits for payment of attorney's fees would have been authorized under Title XVI to the same extent as it is under Title II. See Senate Amendment No. 590 to H.R. 16311, 91st Cong., 2d Sess. (1970), *reprinted in* App., *infra*, 3a ("The provisions of sections [406] and [407] * * * shall apply with respect to this title to the same extent as they apply in the case of title II."). The Senate Finance Committee, however, never reported out H.R. 16311, and the bill died in the 91st Congress.[9]

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[8] The full text of Senator Ribicoff's proposed amendment (Senate Amendment No. 590) is not reproduced in the Congressional Record, but it has been retained by the Library of Congress; the Library catalogues such proposed amendments by Congress and bill number. Because this and certain other amendments to which we will refer are not otherwise readily available, we have reproduced them in an appendix to this brief. The relevant text of Senator Ribicoff's proposed amendment is set forth at App., *infra*, 3a.

[9] During the same session of the 91st Congress, the House had also passed another social security measure, H.R. 17550, 91st Cong., 2d Sess. (1970), which proposed a general increase in social security benefits. See 116 Cong. Rec. 16588 (1970); H.R. Rep. 91-904, 91st Cong., 2d Sess. (1970). In the Senate, that bill became the focus of controversy when several Senators, hoping to enhance the prospects for enactment of the "family assistance plan," attempted unsuccessfully to amend H.R. 17550 to include such provisions. See, *e.g.*, 116 Cong. Rec. 42405-42410, 42459, 43625-43646 (1970). Notably, an amendment to that effect proposed jointly by Senators Ribicoff and Bennett would *not* have incorporated Section 406 in its entirety into the family assistance plan; rather, certain portions of Section 406 would have been incorporated, but those portions authorizing withholding of attorney's fees would have been deleted. See 116 Cong. Rec. 42410 (1970) (Amendment No. 1169) (App., *infra*, 7a) (incorporating into the family assistance plan the provisions of Section 406(a) "other than the penultimate sentence thereof"); see also Amendment No. 1097 to H.R. 17550, 91st Cong., 2d Sess. (1970), *reprinted in* App., *infra*, 5a (same). Hence, under the Ribicoff-Bennett amendment to H.R. 17550, there would have been no withholding of attorney's fees. Although the Senate eventually passed H.R. 17750 with unrelated amendments, the Senate version did not include a family assistance plan and the two chambers could not reconcile their differences before the close of the 91st Congress. See 116 Cong. Rec. 43866, 44106, 44135, 44478-44479 (1970); *id.* at 44567-44578 (1971).

At the outset of the 92d Congress, Representative Mills again introduced a bill to create a federally-administered "family assistance plan." See H.R. 1, 92d Cong., 1st Sess. § 301 (1971); 117 Cong. Rec. 170 (1971). Like H.R. 16311 in the previous Congress, H.R. 1 also proposed to repeal Titles I, X and XIV and to retain Title XVI as a federally-financed, state-administered program; in the latter respect, the bill rejected Senator Ribicoff's suggestion that Title XVI be federally-administered. See H.R. 1, 92d Cong., 1st Sess. § 304, at 197-235. The proposed "family assistance plan" once again incorporated Section 406 of Title II in its entirety. See H.R. 1, 92d Cong., 1st Sess. § 301, at 152 (1971) ("The provisions of sections [406] and [407] * * * shall apply with respect to this part to the same extent as they apply in the case of title II.").

In May 1971, the House Ways and Means Committee reported out a revised version of H.R. 1 (see H.R. Rep. 92-231, 92d Cong., 1st Sess. (1971)), which the House passed (see 117 Cong. Rec. 21463 (1971)). This revised version differed from the bill originally introduced by Representative Mills in two relevant respects. First, it proposed to convert Title XVI (renumbered as Title XX) into a national program to be administered by the federal government; like the Ribicoff proposal in the 91st Congress, the bill borrowed the administrative framework for

this program from the proposed "family assistance plan." See 117 Cong. Rec. 21092 (1971) (Rep. Mills); compare *id.* at 21443-21444 (federal program for the needy aged, blind, and disabled) with *id.* at 21451-21452 (family assistance plan). Second, the version of H.R. 1 passed by the House did *not* incorporate Section 406 of Title II into *either* the family assistance program *or* the new federal program for the needy aged, blind, and disabled. See 117 Cong. Rec. 21443 (1971) (family assistance program) ("The provisions of section [407] * * * shall apply with respect to this part to the same extent as they apply in the case of title II."); *id.* at 21451 (aid to aged, blind, and disabled) (same). Instead, the House included identical language in each program to provide, as Section 406 of Title II had provided before it was amended in 1965 and 1967 (see page 8, *supra*), that the Secretary was simply to regulate the conduct of attorneys practicing before him and to prescribe maximum fees. See 117 Cong. Rec. 21443, 21451 (1971).

In short, no authority to withhold attorney's fees was included in H.R. 1 as it passed the House. The House report explained the omission of withholding authority in the context of administrative proceedings in identical terms for both programs: "Your committee believes that to withhold [attorney's] fees would be contrary to the purpose of the program." See H.R. Rep. 92-231, *supra*, at 156 (aged, blind, and disabled); *id.* at 187 (family assistance program).

When H.R. 1 reached the Senate, the proposed "family assistance plan," together with the related repeal of the AFDC program, was deleted from the bill. The Senate, however, retained that portion of H.R. 1 which repealed Titles I, X and XIV and converted Title XVI into a national program under federal administration. Again following the House, the Senate declined to incorporate all of Section 406 into the new Title XVI by reference, choosing instead to write into that Title only that portion of Section 406(a) which corresponded to its pre-1965 version—the version that did not include any withholding authority. See 118 Cong. Rec. 32474-32475, 32898 (1972) (Sen. Long); *id.* at 32905, 33995 (passage of H.R. 1 in Senate); see also S. Rep. 92-1230, 92d Cong., 2d Sess. 392 (1972) ("[T]here would be no withholding of attorney fees from [the] individual's benefits.").[10] The bill approved by the Conference Committee, and signed by the President, followed the Senate version in both these respects. See Pub. L. No. 92-603, § 301, 86 Stat. 1476 (now codified at 42 U.S.C. (Supp. III) 1383(d)(1)); see 118 Cong. Rec. 36502, 36804, 36821, 36914, 37202 (1972).

b. This legislative history reveals two salient facts. First, Congress specifically considered, yet declined to enact, a version of Title XVI that would have incorporated Section 406 in its entirety from Title II into the SSI program. Indeed, the very first proposal considered by Congress to convert Title XVI into a federally-administered welfare program—the proposal submitted by Senator Ribicoff in 1970—would have done precisely that. See Senate Amendment No. 590, *supra* ("The provisions of sections [406] and [407] * * * shall apply with respect to this title to the same extent as they apply in the case of title II."); see also 116 Cong. Rec. 12326-12329, 12340 (1970) (Sen. Ribicoff). If the Ribicoff proposal had been adopted by Congress and enacted into law, the Secretary's with-

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[10] While the Senate rejected various proposals to restore the "family assistance program" to the Senate bill (see 118 Cong. Rec. 33075, 33095, 33110-33113, 33429 (1972)), it is significant that those proposed amendments, like the bill ultimately adopted, took care not to include any authority to withhold attorney's fees from past-due benefits. See Senate Amendment No. 1614 to H.R. 1, 92d Cong., 2d Sess. 62 (1972), *reprinted in* App., *infra*, 9a (proposing to incorporate the provisions of Sections 407 and 406(a) "other than the fifth and sixth sentences thereof"); Senate Amendment No. 1668 to H.R. 1, 118 Cong. Rec. 33082 (1972) (same).

holding authority, and the power of federal district courts to order withholding, would have been identical in Titles II and XVI. But Congress did not adopt that proposal.

Second, when Congress in 1972 did pass legislation to convert Title XVI into a federally-administered welfare program, it deliberately modified the language of the prior Ribicoff proposal so that Section 406 would *not* be incorporated. Compare Senate Amendment No. 590, *supra* ("The provisions of sections [406] and [407] * * * shall apply * * *"), with 42 U.S.C. (Supp. III) 1383(d)(1) ("The provisions of section 407 * * * shall apply * * *"). As explained in the House Report, Congress consciously omitted any withholding authority in the context of Title XVI *administrative* proceedings because it concluded that "to withhold such fees would be contrary to the purpose of the program." H.R. Rep. 92-231, *supra*, at 156; see also S. Rep. 92-1230, 92d Cong., 2d Sess. 392 (1972) ("[T]here would be no withholding of attorney fees from [the] individual's benefits."). It is logical to assume that Congress omitted withholding authority in Title XVI *judicial* proceedings for exactly the same reason.

Congress's policy judgment, moreover, makes perfect sense. Unlike Title II benefits, which are based on a person's disability and insured status, SSI benefits are based on a person's financial need. Congress appreciated the importance of keeping those benefits intact. The House report, in a related context, accordingly "emphasize[d] its strong belief that if the benefits which would be provided under [Title XVI] are to meet the most basic needs of the poor, the benefits must be protected from seizure in legal processes against the beneficiary. * * * [E]ntitlement to these benefits would not be transferable or assignable" (H.R. Rep. 92-231, *supra*, at 156).[11]

[11] Congressional concern with the impact of withholding on welfare recipients is likewise evident in legislators' repeated efforts to omit

The absence of attorney-fee withholding authority in Title XVI thus reflects a considered judgment by Congress. Congress reasonably concluded that an up-front reduction in past-due benefits by as much as 25% would be unacceptable in the SSI context, since it could impose hardships on recipients who are by definition below the basic subsistence level. Congress decided instead to leave it to the SSI recipient and his lawyer to arrange for the latter's compensation in some less burdensome fashion, such as payment in installments over an extended period of time.

c. Subsequent congressional action also supports the Secretary's view that Title XVI contains no withholding authority. In 1981, Representative Aspin introduced a bill "to amend title XVI of the Social Security Act * * * * * to allow the award of attorney fees" in appeals involving claims for SSI benefits "on the same basis as [is presently provided] under title II [of such Act]" (H.R. 4839, 97th Cong., 1st Sess., 127 Cong. Rec. 25636 (1981) (App., *infra*, 10a). Representative Aspin explained his understanding that "[u]nder the current law, no provision is made for the award of attorney fees in [SSI] appeals. The payment of fees is left as a matter between attorney and client" (127 Cong. Rec. 25636 (1981)). Congress's failure to enact this proposal, like its failure to pass the Ribicoff proposal in 1970, suggests that the Title XVI withholding authority hypothesized by the court of appeals does not exist.[12]

withholding authority in several versions of proposed family assistance legislation. See notes 9, 10, and page 16, *supra*.

[12] This Court "take[s] great care, of course, before relying on the understandings of Members of a subsequent Congress as to the actions of an earlier one" (*Heckler* v. *Turner*, 470 U.S. 184, 209 (1985)). It has frequently been observed, however, that "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress's

B. Neither The 1976 Amendment To Title XVI That Makes SSI Cases Subject To Judicial Review To The Same Extent As In Title II Nor Respondent's Notions Of Sound Policy Authorize The Federal Courts To Order The Secretary To Withold Past-Due SSI Benefits To Pay Attorney's Fees

Respondent admits that Title XVI, as enacted in 1972, "does not make any provision for attorney's fees" (Br. in Opp. 7). Respondent, however, adopts the approach of the Eighth Circuit in this case (Pet. App. 4a-5a, 8a) and of the other courts that have ruled against the Secretary on this question[13] to argue that courts possess inherent or implicit authority to order the withholding of past-due SSI benefits to pay a claimant's attorney. This argument is based principally upon Congress's amendment of Title XVI's judicial review provision in 1976, buttressed by notions of sound public policy. The argument is incorrect.

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attention through legislation specifically designed to supplant it." *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 15. We call to the Court's attention in this regard that a statement in a 1985 House report concerning extension of the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), arguably cuts in the opposite direction from the unsuccessful Aspin amendment discussed in the text. See H.R. Rep. 99-120, 99th Cong., 1st Sess. 19-20 (1985) (mistakenly assuming, in connection with EAJA amendments, that attorney's fees could be withheld from SSI benefits under Title XVI). That statement, however, was no doubt made in reliance on the Third Circuit's decision in *Reid* v. *Heckler*, 735 F.2d 757 (1984), which at the time was the only appellate decision that had addressed the question presented here. Of these two subsequent legislative episodes, we think that the unsuccessful Aspin amendment is more relevant. But the conjunction of the two does point up the pitfalls of attempting to rely on this sort of legislative evidence.

[13] See, *e.g.*, *Reid* v. *Heckler*, *supra*; *Adams* v. *Secretary of Health & Human Services*, 596 F. Supp. 449, 453 (N.D.N.Y. 1984); see also *Dolin* v. *Harris*, 501 F. Supp. 97, 98 (D. Md. 1980).

1. Prior to its amendment in 1976, Title XVI's judicial review provision, 42 U.S.C. (Supp. II 1972) 1383(c)(3), provided as follows:

> The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in Section 405(g) of this title to the same extent as the Secretary's final determinations under Section 405 of this title; except that the determination of the Secretary after such hearing as to any fact shall be final and conclusive and not subject to review by any court.

In 1976, Congress amended the statute to delete the "except" clause. Act of Jan. 2, 1976, Pub. L. No. 94-202, 89 Stat. 1135. As the Senate Report accompanying this amendment explained, the effect of deleting the "except" clause was to make the Secretary's factual findings in SSI cases subject to judicial review, whereas such findings had previously been final and conclusive. For periods postdating the 1976 amendment, in order words, Section 405(g) applies identically to the Secretary's disability and SSI determinations, so that "the same rules of judicial review [apply] to title XVI cases as apply to title II cases." S. Rep. 94-550, 94th Cong., 1st Sess. 4 (1975). The House Report further explained that, "[b]y removing this language from title XVI, findings of fact of the Secretary in SSI cases, if supported by substantial evidence, shall be conclusive as are such findings under title II. * * * [B]oth programs should be under the 'substantial evidence rule,' but * * * this should not be interpreted by the courts as a license to vary from strict adherence to its principles." H.R. Rep. 94-679, 94th Cong., 1st Sess. 3 (1975).

According to respondent (Br. in Opp. 7) and the Eighth Circuit (Pet. App. 8a), one effect of this 1976 amendment was to empower courts for the first time to offset attorney's fees against past-due SSI benefits, on the theory that "the authority to provide for the payment of

attorney's fees is an integral part of the court's power of judicial review under section 405(g)." This conclusion seriously misapprehends the significance of the 1976 amendment. The sole purpose and effect of that amendment was to make the Secretary's factual findings in SSI cases subject to judicial review. There is absolutely no suggestion in the legislative history that Congress intended by this action to modify, sub silentio, the careful and deliberate manner in which it had addressed the subject of attorney-fee withholding four years earlier. As we have explained, Congress at that time specifically rejected a proposal that would have incorporated Section 406 into Title XVI, and it stated that the withholding of attorney's fees in Title XVI cases "would be contrary to the purpose of the program." H.R. Rep. 92-231, *supra*, at 156.

The character of the 1976 amendment, moreover, shows that it cannot possibly have the effect that respondent ascribes to it. The withholding of attorney's fees in Title II cases is authorized by Section 406(b)(1), not by Section 405(g). It is simply illogical to assume that Congress in 1976 meant to incorporate the former section into Title XVI by amending a reference to the latter. The 1976 amendment, furthermore, took the form of a *deletion* from 42 U.S.C. (Supp. II 1972) 1383(c)(3). Had Congress wished to incorporate into Title XVI an attorney-fee provision that it previously lacked, the deletion of language from Title XVI would be an odd way to effectuate that intent, particularly since the deleted language had nothing whatever to do with attorney-fee withholding.[14]

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[14] Principles of sovereign immunity also suggest that respondent's reliance on Section 405(g) is misplaced. Section 405(g) is a waiver of sovereign immunity and thus must be strictly construed; it may not be interpreted "in a manner that would 'extend the waiver beyond that which Congress intended.'" *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983) (quoting *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979)). Absent a waiver, it would violate sovereign immunity for a court to order the Secretary to direct the payment to a claimant's lawyer of a portion of his SSI benefits as attorney's fees. See generally *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 516-517 (1984); *Buchanan* v. *Alexander*, 45 U.S. (4 How.) 20 (1846); see also *Howard* v. *Bowen*, No. 86-2014 (7th Cir. July 1, 1987), slip op. 5-6 n.1.

2. Respondent (Br. in Opp. 7) and the court of appeals (Pet. App. 3a, 6a) likewise err in relying on *Celebrezze* v. *Sparks*, 342 F.2d 286 (5th Cir. 1965), to support the withholding of attorney's fees in Title XVI cases. That decision concerned Title II, and it held that Section 405(g) endowed the courts with inherent authority to "provide for the payment from the past due [disability] benefits recovered by the claimant in the litigation of counsel fees for conducting it" (342 F.2d at 288). The decision in *Sparks*, however, was rendered four months before Congress effectively codified its result by adding to Title II Section 406(b), which explicitly authorizes the withholding of attorney's fees in Title II cases. See Social Security Amendments of 1965, Pub. L. No. 89-97, § 332, 79 Stat. 403; page 9, *supra*. As explained above, Congress has never acted to add a similar provision to Title XVI—indeed, it has declined several times to do so—thereby evidencing its intent, explicit in the 1972 legislative history, that such a provision "would be contrary to the purpose of the [Title XVI] program." H.R. Rep. 92-231, *supra*, at 156. Thus, regardless whether the *Sparks* case was correctly decided in 1965, its rationale has been superseded by subsequent legislative developments.[15]

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[15] Both the motion for an attorney's fee filed in this case (J.A. 5-12) and the district court's order directing the Secretary to pay fees out of respondent's past-due SSI benefits (Pet. App. 10a) undercut respondent's claim that "inherent judicial power" provides a source for Title XVI withholding authority. The motion for fees filed by respondent's lawyer attached an application for fees under Section 406 (J.A. 6), and the district court's order explicitly relied on Section 406(b)(1). See Pet. App. 10a ("Therefore, IT IS ORDERED that an attorney's fee

3. Finally, in expressing support for attorney-fee withholding in Title XVI cases, both respondent (Br. in Opp. 7-10) and the court of appeals (Pet. App. 8) mistakenly substitute their own views of sound public policy for the view that Congress has expressed. Respondent asserts (Br. in Opp. 7) that "[t]here is a very important social policy for adequately insuring payment of attorney's fees in SSI cases." The court of appeals' decision to incorporate Section 406(b)(1) into Title XVI likewise rests on its belief that Congress must have intended this result because, in the court's view, withholding of attorney's fees is equally sound policy in Title XVI as in Title II. See Pet. App. 8a; see also *Reid* v. *Heckler*, 735 F.2d at 762 ("The need for competent representation is perhaps even more acute [in Title XVI cases] than in Title II cases because the claimants in Title XVI matters are, by definition, in financial straits.").

Congress, however, reached precisely the opposite policy determination when it concluded that withholding of attorney's fees "would be contrary to the purpose of the [Title XVI] program" because of the hardship that such a reduction in past-due benefits would impose on the program's needy recipients. H.R. Rep. 92-231, *supra*, at 156. Congress evidently concluded in 1972 that the policy considerations favoring withholding of attorney's fees—considerations that prompted Congress in 1965 and 1967 to add such withholding authority to Title II—were outweighed in the Title XVI context by competing policy considerations, particularly those dictated by the relative financial neediness of Title XVI (as opposed to Title II)

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* * * payable from the plaintiff's past due benefits is hereby allowed to * * * plaintiff's attorney, pursuant to 42 U.S.C. § 406(b)(1)."). Thus, both respondent and the district court relied, not upon any inherent judicial power to withhold fees, but on a supposed *statutory* authority, derived from the implied incorporation by reference of Section 406(b) into Title XVI.

recipients. Neither the Secretary nor this Court "sit[s] to pass on policy or the wisdom of the course Congress has set" (*Heckler* v. *Turner*, 470 U.S. 184, 212 (1985)). The Secretary has properly deferred to Congress's policy judgment, and the court of appeals, at the behest of respondent, had no license to arrive at a different accommodation of the competing interests.[16]

C. The Secretary's Determination That Title XVI Does Not Allow A Court To Order The Withholding Of Attorney's Fees From Past-Due Benefits Is A Reasonable Construction Of The Statute And Therefore Should Be Upheld

Where, as in this case, "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc.* v. *Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842-843

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[16] As recently noted by the Seventh Circuit in *Howard* v. *Bowen*, No. 86-2014 (July 1, 1987), slip op. 7 (footnote omitted), respondent's "policy argument is undercut by the fact that Congress, when it reenacted the Equal Access to Justice Act (EAJA) in 1985, made clear that under the EAJA attorneys could collect fee awards from the federal government in SSI cases." See Pub. L. No. 99-80, § 3, 99 Stat. 186 (codified at 28 U.S.C. 2412(d) note); H.R. Rep. 99-120, 99th Cong., 1st Sess. 20 (1985). Respondent's policy argument also appears to assume (Br. in Opp. 8) that, absent incorporation into Title XVI of Section 406(b)(1)—together with its 25% cap on awardable fees—courts would be powerless to protect SSI recipients from inordinately large attorney-fee awards. Both the bench and the bar, however, would have at their disposal the same means to protect people from unscrupulous lawyers in SSI cases that they have in the generality of cases. In addition, Congress's overriding concern with the adverse impact of withholding on welfare recipients is of course not similarly implicated by a court's prescribing a maximum attorney's fee for judicial proceedings. In any event, this case does not present a question as to the appropriate maximum fee in Title XVI cases and there is accordingly no reason for the Court to address that issue here.

(1984) (footnote omitted); see *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 5-7. But even where the intent of Congress is not clear, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation by the administrator of an agency." *Chevron U.S.A. Inc.*, 467 U.S. at 844 (footnote omitted). That principle, if no other, would mandate reversal of the court of appeals' judgment in this case.

The construction of Title XVI that the Secretary advances here is of long standing.[17] That construction represents the view of the agency charged with administering the statute, and it is a reasonable interpretation of Title XVI. It is entirely consistent, not only with the language and structure of Title XVI, but also with its legislative history. In these circumstances, the Secretary's construction is entitled to deference and should be upheld. See *Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 14-15; *Young* v. *Community Nutrition Institute*, slip. op. 5-7; *Connecticut Dep't of Income Maintenance* v. *Heckler*, 471 U.S. 524 (1985).

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[17] Respondent (Br. in Opp. 9) mistakenly infers from a recent notice of proposed rulemaking (52 Fed. Reg. 8309-8311 (1987)) that the Secretary's interpretation of Title XVI is of recent vintage. But that notice, in stating that "there is no provision in Title XVI for paying an attorney's fee from past-due benefits," and in proposing to revise certain regulations to state that fact more clearly, simply reflects a more explicit expression of the Secretary's longstanding view, as enunciated both in litigation and in prior regulations. See, *e.g.*, 39 Fed. Reg. 36003 (1974) ("[T]here is no provision * * * for the direct payment by the Social Security Administration of fees to attorneys out of the past-due benefits of [SSI] claimants."); 20 C.F.R. 416.1520(d)(3) (stating that the Secretary in Title XVI administrative proceedings "assume[s] no responsibility for the payment of a fee based on a representative's services").

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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JULY 1987

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APPENDIX

[AMENDMENT NO. 590]

91st CONGRESS 2d SESSION

H.R. 16311

IN THE SENATE OF THE UNITED STATES

April 20, 1970

Referred to the Committee on Finance
and ordered to be printed

AMENDMENTS

Intended to be proposed by Mr. Ribicoff to H.R. 16311, an [d] Act to authorize a family assistance plan providing basic benefits to low-income families with children, to provide incentives for employment and training to improve the capacity for employment of members of such families, to achieve greater uniformity of treatment of recipients under the Federal-State public assistance programs and to otherwise improve such programs, and for other purposes, viz:

On page 73, line 4, strike out "90 per centum" and insert in lieu thereof "90 per centum (in the case of any calendar quarter commencing prior to June 30, 1972), and 100 per centum (in the case of any calendar quarter commencing after June 30, 1972).".

"FEDERAL PROGRAM FOR AID TO THE AGED, BLIND, AND DISABLED

"Sec. 206. Effective July 1, 1974, title XVI of the Social Security Act (as amended by section 201 of this Act) is further amended to read as follows:

" 'TITLE XVI—AID FOR THE AGED, BLIND, AND DISABLED

* * * * *

" 'PAYMENTS AND PROCEDURES

" 'Overpayments and Underpayments

" 'Sec. 1605. (a) Whenever the Secretary finds that more or less than the correct amount of aid has been paid to any individual under this title, proper adjustment or recovery shall, subject to the succeeding provisions of this subsection, be made by appropriate adjustments in future payments of aid to the overpaid individual or by recovery from him or his estate or payment to him. The Secretary shall make such provision as he finds appropriate in the case of payment of more than the correct amount of benefits with a view to avoiding penalizing individuals who were without fault in connection with the overpayment, if adjustment or recovery on account of such overpayment in such case would defeat the purposes of this title, or be against equity or good conscience, or (because of the small amount involved) impede efficient or effective administration.

" 'Hearings and Review

" '(b)(1) The Secretary shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be entitled to aid under this title and is in disagreement with any determination under this title with respect to eligibility of such individual for such aid, or the amount of such aid, if such individual requests a hearing on the matter in disagreement within thirty days after notice of such determination is received. Until a determination is made on the basis of such hearing or upon disposition of the matter through default, withdrawal of the request by the individual, or revision of the initial determination by the Secretary, any amounts which are payable (or would be payable but for the matter in disagreement) to such individual (if such individual had been determined to be entitled to aid under this title) shall continue to be paid; but any amounts so paid for periods prior to such determination or disposition shall be considered overpayments to the extent they would not have been paid had such determination or disposition occurred at the same time as the Secretary's initial determination on the matter in disagreement.

" '(2) Determination on the basis of such hearing shall be made within ninety days after the individual requests the hearing as provided in paragraph (1).

" '(3) The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 205(g) to the same extent as the Secretary's final determinations under section 205; except that the determination of the Secretary after such hearings as to any fact shall be final and conclusive and not subject to review by any court.

" 'Procedures: Prohibition of Assignments

" '(c) The provisions of sections 206 and 207 and subsections (a), (d), (e), and (f) of section 205 shall apply with respect to this title to the same extent as they apply in the case of title II.

* * * * *

[AMENDMENT NO. 1097]

Calendar No. 1443

91st CONGRESS 2d SESSION

H.R. 17550

IN THE SENATE OF THE UNITED STATES

December 9, 1970

Ordered to lie on the table and to be printed

AMENDMENTS

Intended to be proposed by Mr. Ribicoff (for himself and Mr. Bennett) to H.R. 17550, an Act to amend the Social Security Act to provide increases in benefits, to improve computation methods, and to raise the earnings base under the old-age, survivor, and disability insurance system, to make improvements in the medicare, medicaid, and maternal child health programs with emphasis upon improvements in the operating effectiveness of such programs, and for other purposes, viz:

Strike out title V of the bill and insert in lieu thereof the following:

SHORT TITLE

Sec. 501. This title with the following table of contents may be cited as the "Family Assistance Act of 1970".

* * * * *

"PAYMENTS AND PROCEDURES
"Payments of Benefits

Sec. 446. (a)(1) Family assistance benefits shall be paid not less frequently than monthly, except that such benefits may be paid quarterly in any case in which the Secretary determines that the amount of such benefits for a quarter will not exceed $30.

* * * * *

"Procedures: Prohibition of Assignments

"(d) The provisions of sections 206(a) (other than the penultimate sentence thereof) and 207 and subsections (a), (d), (e), and (f) of section 205 shall apply with respect to this part to the same extent as they apply in the case of title II.

* * * * *

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[AMENDMENT NO. 1169]

Calendar No. 1443

91st CONGRESS 2d SESSION

H.R. 17550

IN THE SENATE OF THE UNITED STATES

December 18 (legislative day, December 15), 1970

Ordered to be printed

AMENDMENT

Proposed by Mr. Ribicoff (for himself and Mr. Bennett) to the amendment of Mr. Scott numbered 1168 to HR. 17550, an Act to amend the Social Security Act to provide increases in benefits, to improve computation methods, and to raise the earnings base under the old-age, survivors, and disability insurance system, to make improvements in the medicare, medicaid, and maternal child health programs with emphasis upon improvements in the operating effectiveness of such programs, and for other purposes, viz: At the end of the amendment of the Senator from Pennsylvania (Mr. Scott) numbered 1168 insert the following:

SHORT TITLE

(1) The following paragraphs of this subsection, with the following table of contents, may be cited as the "Family Assistance Act of 1970".

* * * * *

"PAYMENTS AND PROCEDURES
"Payments of Benefits

"Sec. 446. (a)(1) Family assistance benefits shall be paid not less frequently than monthly, except that such benefits may be paid quarterly in any case in which the Secretary determines that the amount of such benefits for a quarter will not exceed $30.

* * * * *

"Procedures: Prohibition of Assignments

"(d) The provisions of section(s) 206(a) (other than the penultimate sentence thereof) and 207 and subsections (a), (d), (e), and (f) of section 205 shall apply with respect to this part to the same extent as they apply in the case of title II.

* * * * *

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[AMENDMENT NO. 1614]

Calendar No. 1175

92d CONGRESS 2d SESSION

H.R. 1

IN THE SENATE OF THE UNITED STATES

September 28, 1972

Ordered to lie on the table and to be printed

AMENDMENT

Intended to be proposed by Mr. Ribicoff to H.R. 1, an Act to amend the Social Security Act to increase benefits and improve eligibility and computation methods under the OASDI program, to make improvements in the medicare, medicaid, and maternal child health programs with emphasis upon improvements in the operating effectiveness, to replace the existing Federal-State public assistance programs with a Federal program of adult assistance and a Federal program of benefits to low-income families with children with incentives and requirements for employment and training to improve the capacity of employment of members of such families, and for other purposes, viz:

TITLE IV—FAMILY PROGRAMS
Establishment of opportunities for Families
Program and Family Assistance Plan

SEC. 401. The Social Security Act is amended by adding at the end thereof (after the new title added by section 301 of this Act) the following new title:

"TITLE XXI—OPPORTUNITIES FOR FAMILIES
PROGRAM AND FAMILY ASSISTANCE PLAN
"Goal Statement; Appropriations

* * * * *

"Part D—Procedural and General Provisions
"Payments and Procedures
"Payment of Benefits

"SEC. 2171. (a)(1) Benefits under this title shall be paid at such time or times and in such installments as will best effectuate the purposes of this title, but in no event will such benefits be paid less often than monthly.

* * * * *

"Procedures: Prohibition of Assignment: Representative of Claimants

"(d)(1) The provisions of section 207, section 206(a), (other than the fifth and sixth sentences thereof), and subsections (a), (d), (e), and (f) of section 205 shall apply with respect to this part to the same extent as they apply in the case of title II.

"(2) To the extent the Secretary finds it will promote the achievement of the objectives of this part, qualified persons may be appointed to serve as hearing examiners in hearings under subsection (c) without meeting the specific standards prescribed for hearing examiners by or under subchapter II of chapter 5 of title, 5, United States Code.

* * * * *

97th CONGRESS 1st SESSION

H.R. 4839

To amend title XVI of the Social Security Act to allow the award of attorneys fees in appeals involving claims for supplemental security income benefits on the same basis as is presently provided under title II of such Act in the case of appeals involving claims of old-age, survivors, and disability insurance benefits.

IN THE HOUSE OF REPRESENTATIVES

October 27, 1981

Mr. Aspin introduced the following bill; which was referred to the Committee on Ways and Means

---

A BILL

To amend title XVI of the Social Security Act to allow the award of attorneys fees in appeals involving claims for supplemental security income benefits on the same basis as is presently provided under title II of such Act in the case of appeals involving claims of old-age, survivors, and disability insurance benefits.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 1631(d)(2) of the Social Security Act is amended by inserting after the fourth sentence the following new sentences: "Whenever the Secretary, in any claim before him for benefits under this title, makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a

reasonable fee to compensate such attorney for the services performed by him in connection with such claim. If, as a result of such determination, such claimant is entitled to past-due benefits under this title, the Secretary shall, notwithstanding any other provision of this title, certify for payment (out of such past-due benefits) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 per centum of the total amount of such past-due benefits, (B) the amount of the attorney's fee so fixed, or (C) the amount agreed upon between the claimant and such attorney as the fee for such attorney's services.".

(b) Section 1631(d)(2) of such Act is further amended –

(1) by inserting "(A)" after "(2)";

(2) by striking out "this paragrpah" in the third sentence and inserting in lieu thereof "this subparagraph"; and

(3) by adding at the end thereof the following new subparagraph:

"(B)(i) Whenever a court renders a judgment favorable to a claimant under this title who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 per centum of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding any other provison of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this clause.

"(ii) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which clause (i) is applicable any

amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.".

Sec. 2. The amendments made by the first section of this Act shall apply with respect to proceedings initiated (before the Secretary in the case of the amendment made by subsection (a) of such section, and before the court in the case of the amendments made by subsection (b) of such section) on or after the date of the enactment of this Act.

U.S. GOVERNMENT PRINTING OFFICE: 1987 — 181 483 40422

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
SEP 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1146

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

OTIS R. BOWEN, SECRETARY OF
HEALTH AND HUMAN SERVICES
Petitioner

v.

MARY ALICE GALBREATH
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether the federal courts have the authority to order the Secretary of Health and Human Services to withhold attorney's fees from court-ordered past due SSI benefits payable under Title XVI of the Social Security Act, 42 U.S.C. 1381-1383, and to pay those fees directly to the claimant's attorney in order to insure timely and court-supervised payment to the attorney.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 799 F. 2d 370. The opinion of the district court (Pet. App. 9a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a) was entered on August 14, 1986. On November 3, 1986, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including January 11, 1987 (a Sunday). The petition was filed on January 12, 1987, and was granted on May 4, 1987 (J.A. 13). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

STATUTES INVOLVED

The pertinent statutory provisions are set forth at Pet. App. 12a-15a.

STATEMENT OF THE CASE

The Secretary of Health and Human Services ("Secretary") appealed to the 8th Circuit from the district court's order directing the Secretary to pay an attorney's fee from past-due supplemental security

income (SSI) benefits awarded to the attorney's client, Mary Alice Galbreath, under Title XVI of the Social Security Act ("Act"). The Secretary argued that the Act does not authorize the withholding of past due SSI benefits for the payment of attorney's fees. The 8th Circuit affirmed the district court's order.

Mary Allice Galbreath applied for SSI benefits on May 26, 1982. The Secretary denied Galbreath's application; on August 10, 1983 Galbreath appealed this administrative decision to the federal district court. On February 15, 1985 the district court reversed the Secretary's denial of Galbreath's claim, and the Secretary proceeded to effectuate the court's decision. Galbreath was sent a check dated July 23, 1985 in the amount of $7,954.00. Galbreath's attorney, Anthony W. Bartels, then moved the court for attorney's fees in the amount of $1,988.50, or 25% of

Galbreath's past due benefits. In its order, the district court determined that the amount requested by Bartels was reasonable, and ordered the Secretary "to compute, certify and pay" Bartels his requested fee.

On appeal to the 8th Circuit, the Secretary argued that neither the Act nor the secretary's regulations authorized the withholding of past-due benefits for payment of attorney's fees in SSI cases, and that therefore the district court was without power to order the Secretary to withhold attorney's fees from Galbreath's benefits for payment to Bartels. The Secretary asserted that the section of the Act relied on by the district court in its order, 42 U.S.C. Section 406 (b) (1), pertains only to the attorney's fees for services before the court in Title II (disability benefits) cases, and that no counterpart for section 406 (b) (1) existed in Title XVI. The Secretary contended that

without such statutory authority, he is obligated to authorize full payment of SSI benefits to a claimant on establishment of his or her entitlement to such benefits, without diverting part of the benefits in payment of an attorney's fee.

SUMMARY OF ARGUMENT

Federal Courts may direct the Secretary of Health and Human Services to make an up-front reduction in a claimant's past-due SSI benefits in order to provide for the direct payment of attorney's fees to the claimant's lawyer. Congress may not be able to contemplate the aspect of attorneys not getting paid. But, if the attorney does not get paid, he will no longer represent SSI claimants and the SSI claimants will not have adequate legal representation.

ARGUMENT

The United States Court of Apeals for the Eighth Circuit correctly held that federal courts may direct the Secretary of HHS to withhold attorney's fees from court-ordered past-due SSI benefits and pay these fees directly to the claimant's attorney.

In the United States of America, a disabled American may qualify for either, or both, of two federal benefit programs as a result of his or her disability. Under one program, which is known as Title II of the Social Security Act, there is a provision for disability insurance which program is funded by the worker and employer contributions. The other program, the Supplemental Security Income or more commonly known as SSI of Title XVI of the Act does not depend on the claimant's insured status, but instead provides a minimum income for the aged, blind and disabled who meet the disability standards as set by the Secretary of Health and Human Services. A Title II disability

claimant can also get Title XVI benefits if his Title II benefits fall below a certain monthly level of benefits.

The procedure for getting Social Security disability benefits begins with the claimant applying for benefits at his Social Security claim office. There are several appeal steps but usually people are not acquainted with the legal technicalities of the appeal and must eventually get someone to help them. A non-lawyer may also serve as a representative in the Social Security appeal process at the administrative level. The representative is entitled to a fee for services depending on what the Social Security Administration feels is adequate. There is no court review process of an administrative award of a fee. However, if the claimant's case has to be appealed to the court level, the courts then have the power to award a fee. Much trouble comes about in

trying to collect a fee in Title II and Title XVI cases. In a Title II case, the Secretary can be very dilatory in not paying for a long period of time, or so to speak, not act on the fee petition. Once a federal court awards a fee for work done at the court level, the Secretary is supposed to make payment accordingly, but there are time delays in that process as well.

In a Title XVI case, the Secretary takes the position that they do not withhold for attorney's fees, but rather pay the money to the claimant and then the claimant is supposed to pay the fee directly to the lawyer. However, in most instances, after an SSI case is won and the Award Certificate is issued, the Social Security Administration pays the money to the claimant and then about a year later acts upon the fee petition awarding a fee. If the claimant or the lawyer is unhappy with the Administration's fee decision, they

can appeal one step, but that appeal is not subject to judicial review. Meanwhile, with the lapse of time, the claimants usually have the money spent and of course it is not unusual for the clients to get their SSI backpay, spend it, then go to a Legal Services organization and take bankruptcy thus defeating the attorney from getting his fee. The Social Security Administration takes a very unique position with regard to claimants. The first position is, when the claimant tries to get fees, they resist him. Once the case is won, then they want to try to cut out the person or representative who helped the claimant get his benefits.

The district court judge in this case awarded a fee to the attorney and then also went on to order that Social Security pay the claimant's attorney fee directly rather require the attorney to collect his fee from the client.

In the beginning of the Social Security Act, there was only a Title II provision. The Title XVI Act came about in 1972. There was no express authorization to award attorney's fees to the claimant's attorney in the Title II Act, but the federal district courts held that they had the judicial power to do that act of awarding attorney's fees, because the Social Security Act was silent. Celebrezze v. Sparks, 342 F. 2d 286, 290 (5th Cir. 1965). Later, Congress changed that and gave the courts the explicit statutory authority.

In 1972, when the Title XVI Act was implemented, most of all the Title II sections were followed but Congress did not explicitly provide for payment of attorney's fees directly in SSI cases. Thus, the district courts were called upon to make decisions and there have been some district courts ordering the Social Security Administration to

withhold and pay directly to the attorney and there have been contrary district court decisions. Congress did provide for judicial review of Title XVI cases just the same as Title II cases. 42 U.S.C. Section 1383 (c)(3).

Of the courts holding that the Secretary must withhold and pay the attorney's fee direct, the Sixth Circuit, the Northern District of Florida, the Eastern District of Michigan, and the Northern District of Ohio, have held that the district court is without authority to order payment of attorney's fees from past due SSI benefits. See McCarthy v. Secretary of Health and Human Services, No. 85-1401, slip op. at 8 (6th Cir. June 17, 1986); Brown v. Bowen, No. PCA 84-4284-RV, slip op. at 3 (N.D. Fla. May 22, 1986); Franklin v. Secretary of Health and Human Services, 525 F. Supp. 398, 399 (E.D. Mich. 1981); Baim v. Harris, 515 F. Supp. 227 (N.D.

Ohio 1981); Howard v. Bowen, No. 86-2014 (July 1, 1987). The reason these courts have declined to rule in favor of holding out benefits is that they have relied upon a lack of express authority in Title XVI and on the failure of Congress to incorporated Title XVI section 406 (b) (1) of Title II.

However, the Third Circuit, the Eastern District of Kentucky, the Northern District of New York, the District of Maryland, and the Eastern District of Tennessee have all held that the district court does possess the authority to make an award of attorney's fees in SSI cases. Reid v. Heckler, 735 F. 2d at 762; Mullanix v. Heckler, 624 F. Supp. 529, 530-31 (E.D. Ky. 1986); Adams v. Secretary of Health and Human Services, 596 F. Supp. 449, 453 (N.D. N.Y. 1984); Dolin v. Harris, 501 F. Supp. 97, 98 (D. Md. 1980); Vaughn v. Califano, 442 F. Supp. 185, 188 (E.D. Tenn. 1977).

These courts acknowledge the lack of express statutory authority for the award of attorney's fees in SSI cases, but they look to the legislative history of Title XVI to find that Congress intended the same treatment on representation and attorney's fees as that provided for Title II claimants and that the Court possesses an implied inherent power to make such awards. The Reid court used the same reasoning of the Sparks court, Celebrezze v. Sparks, 342 F. 2d at 288, holding that the Court has judicial power to award attorney's fees and that the 1976 amendment to Title XVI incorporating the Section 405 (g) gave the district court the implied authority to grant attorney's fees in SSI cases. See Reid, 735 F. 2d at 761-62.

This writer admits that the 1972 Act does not make any provision for attorney's fees, but the 1976 addition or revision of

the Title XVI Act does grant the court power to award attorney's fees.

Congress made it very clear in amending Title XVI of the Act in 1976 to incorporate Section 405 (g) that the scope of judicial review under Title XVI was to be "vertually identical" to that of Title II. See S. Rep. No. 550, 94 Cong., 1st Sess. 2, reprinted in 1975 U.S. Code Cong. & Ad. News 2347.

There is a very important social policy for adequately insuring payment of attorney's fees in SSI cases. It will promote the important policy of insuring adequate legal representation to SSI claimants. Howard v. Bowen, 633 F. Supp. 495, 499 (N.D. Illinois) 1986. The Court should take judicial notice that most of the SSI claimants are poor, illiterate, and very uneducated and are the lower spectrum of our economic society. And, the Court should realize that if it were not for the attorney representing the claimant,

he would not have gotten on Social Security in the first place. It is argued by this attorney that the Social Security Administration is trying to put a "damper" on attorneys from taking Social Security cases because they will not take such cases if they cannot get adequate compensation. The Court should take judicial notice that the Reagan Administration is very hard on the social programs of this country.

Another reason for having the attorney's fee awarded by the Court is that the adoption of the 25% ceiling does provide some compensation and does allow the court to regulate the fees of attorneys who practice Social Security Law. Once an attorney wins a case and knows he is going to get paid, he has a different outlook on that type of legal business. To win a case and then to not know how long it is going to take to get a fee petition approved, and the fact that the

attorney may not even get paid then, is very disheartening. These are the hard facts of practising law.

And, the court should be made aware of the Administration's tactics in sending the money to the claimant before the award letter is sent out to the attorney. Of course, the attorney's fee petition cannot be submitted until the award is made, and then the Administration is very lengthly in time about approving the attorney's fee, during which time the SSI claimant uses the funds for other purposes other than paying his lawyer. It should be made known to the Court that there is a health care card that comes with the Award of Title II benefits and Title XVI benefits which pays the health care providers. Lawyers do not have the benefit of such a program.

Finally, attached to the Brief in Opposition for the Respondent as Appendix E

is an article from the Federal Register, Vol. 52, No. 51, Tuesday, May 17, 1987, dealing with the proposed rules of the Social Security Administration revising 20 C.F.R. Part 416, changing the rules to hold that there will be no responsibility on the part of the Administration for the payment of any fee approved by a court for the services of a claimant under Title XVI because the Title does not authorize the Administration to make such a payment.

This attempt to change the rules would certainly seem to run contrary to opposing counsel's statement in their brief that the court should adher to the reasonable construction of a statute by the administrative agency charged with its implementation. If the situation was so clear, Social Security would not have to come up with another new proposed rule in the Federal Register.

This court should look at the ends to which this highly deserving social legislation is aimed, that is, to obtain adequate benefits for claimants and to adequately provide for attorneys whose employment was made necessary by the Administration's refusal to put the claimants on in the beginning. To do otherwise is simply keeping lawyers from getting compensated for handling Social Security cases, and the end result will be to keep lawyers from accepting Social Security cases and thus, without assistance from attorneys, the claimants would be powerless to protect themselves.

CONCLUSION

The decision of the court of appeals should be upheld, as it is a proper decision.

Respectfully Submitted,

ORIGINAL SIGNED BY
Anthony W. Bartels

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CERTIFICATE OF SERVICE

I, Anthony W. Bartels, do hereby certify that I have served a copy of the above and foregoing brief on the defendant by mailing a copy of the same to Hon. Charles Fried, Solicitor General, Hon. Richard K. Willard, Assistant Attorney General, Albert G. Lauber, Jr., Deputy Solicitor General, Hon. Richard J. Lazarus, Assistant to the Solicitor General, and William G. Kanter and Jeffrica Jenkins Lee, Attorneys, Department of Justice, Washington, D. C., 20530, on this 30 day of Sept, 1987.

ORIGINAL SIGNED BY
Anthony W. Bartels

Anthony W. Bartels

REPLY

BRIEF

No. 86-1146

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OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARY ALICE GALBREATH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In our opening brief, we showed that Title XVI of the Social Security Act does not authorize federal courts to direct the Secretary to withhold attorney's fees from court-ordered past-due SSI benefits for direct payment to the claimant's lawyer. Respondent's opposing brief fails to address, let alone refute, any of our evidence that Congress specifically considered and rejected the option of giving federal courts the authority to direct withholding of a claimant's past-due benefits for payment of attorney's fees in Title XVI, as it had done in Title II. Respondent does little more than repeat various policy concerns—better addressed to Congress—that respondent believes support the withholding of attorney's fees under Title XVI. Accordingly, only a minimal reply is required.

1. Respondent concedes (Br. 14-15) that Title XVI, as enacted in 1972, "does not make any provision for attorney's fees" and relies exclusively on Congress's amendment of Title XVI in 1976 in claiming that Congress pro-

vided for withholding authority in Title XVI. However, as we explained in our opening brief (at 21-22), the 1976 amendment to Title XVI upon which respondent relies had no such effect. The sole effect of that amendment was to make the Secretary's factual findings in SSI cases subject to judicial review. There is no suggestion in the language or legislative history of that amendment that Congress was also revisiting the distinct issue of attorney's fee withholding, which it had previously addressed in 1972 when it concluded that the withholding of attorney's fees in Title XVI cases "would be contrary to the purpose of the program." H.R. Rep. 92-231, 92d Cong., 1st Sess. 156 (1971).

2. Respondent, like the court of appeals (Pet. App. 8a), relies heavily (Br. 15-17, 19) on various policy considerations in arguing that courts should have authority under Title XVI to order the Secretary to withhold a portion of a claimant's past-due benefits for payment of attorney's fees. As we explained in our opening brief (at 24-25 & n.16), however, Congress made the contrary policy determination that an up-front reduction of as much as 25% of the past-due benefits owed to financialy needy individuals was unacceptable in the SSI contex. Congress decided to leave it to the SSI recipient and his lawyer to arrange for the latter's compensation in some less burdensome fashion, such as payment in installmens over an extended period of time. The Secretary has properly deferred to that congressional judgment and the courts must do the same.[1]

---

[1] Respondent mistakenly relies (Br. 15) on *Howard* v. *Bowen*, 63 F. Supp. 495 (N.D. Ill. 1986), for the proposition that withholding authority will promote "the important policy of insuring adequate legal representation to SSI claimants." As we noted in our openg brief (at 4 n.2, 25 n.16), the Seventh Circuit in *Howard* v. *Bowen*, 23 F.2d 185 (1987)—which respondent does not cite—subsequerly reversed the district court, specifically rejecting the force of thse policy arguments. Shortly before we filed our opening brief, the First Circuit rendered a per curiam decision addressing the issues presented by this case, agreeing with the position taken by respondent. *Clay* v. *Secretary of Health & Human Services*, 823 F.2d 679 (1987).

3. Finally, respondent suggests (Br. 17-18) that a recent proposed rulemaking by the Secretary (see 52 Fed. Reg. 8309-8311 (1987)) shows that there has previously been no "clear" administrative construction. But as we previously argued in our opening brief (at 26 n.17)—which respondent ignores—years of litigation (see Resp. Br. 12-13) and prior rulemakings leave no doubt that the Secretary's view is long standing.[2]

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

CHARLES FRIED
Solicitor General

NOVEMBER 1987

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[2] Respondent also complains (Br. 9-10, 17) that the Secretary often does not act on a lawyer's fee petition until after the Secretary has paid past-due benefits to the claimant, with the result that the lawyer may be unable to collect his fee from the claimant. This complaint has virtually no bearing on this case because it is directed to the requirement of fee approval in administrative proceedings (see 42 U.S.C. 1383(d)(2)), not the absence of withholding authority in judicial proceedings.

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